

## Chapter 11 Property Agents and Motor Dealers Act 2000 (Qld)

### The answer to our prayers or the devil in disguise?

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# Chapter II Property Agents and Motor Dealers Act 2000 (Qld): The answer to our prayers or the devil in disguise?

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## ABSTRACT

In the mid to late 1990's the Gold Coast real property market was the subject of intense marketeering operations. Investigation revealed that the legislation regulating the real estate industry at that time was unable to combat such unethical and unscrupulous behaviour. The Queensland Government realised that action must be taken to provide for protection of consumers in the real property market. After some hasty drafting, the *Property Agents and Motor Dealers Act 2000* (Qld) became effective on 1 July 2001. The aim of the Act was simple - to provide for consumer protection. After numerous and frequent amendments, the Act now prescribes a complex and technical contracting procedure. This thesis suggests that, by over-complicating the contracting procedure, the legislators have lost sight of their original goal of consumer protection.

## KEYWORDS

Real property;Property Agents and Motor Dealers Act 2000 (Qld);Marketeering;Consumer protection

## INTRODUCTION

The real estate industry has undergone rapid and extensive change in the mid to late 1990's. The quality of the legislation applying to that industry and, more importantly, the practices of that industry has failed to keep pace with the demands of the marketplace.

This thesis will examine both the effectiveness and the shortcomings of Chapter 11 of the *Property Agents and Motor Dealers Act 2000* (Qld) ("PAMDA"). Chapter 11 has been chosen due to its sole focus on the process of successfully contracting for the sale of residential property in Queensland. As anecdotal data<sup>1</sup> indicates that the majority of conveyancing transactions involve residential property, Chapter 11 plays what is arguably the most important role of any of the provisions in PAMDA. Other facets of PAMDA such as licensing regulations, rural property transactions and motor vehicle transactions will not be examined at this time.

This thesis will discuss PAMDA in six Parts. Part 1 will discuss the objects and history of PAMDA together with its application in Queensland conveyancing. This will provide the historical basis necessary to properly examine Chapter 11.

The evolution, content and effect of Chapter 11 is the focus of Part 2 of this thesis. This Part will examine the necessity of including consumer protection information in contracts, the cooling-off period and the independence of lawyers in conveyancing transactions. Part 2 will also analyse when parties are bound in conveyancing contracts together with the correct manner for submission and exchange of the appropriate contract documentation.

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<sup>1</sup> Data obtained from Johnson Property Lawyers, Broadbeach Waters reveals that nearly 90% of conveyancing files for the period 1 July 2006 – 30 June 2007 related to residential properties.

The common law plays an important role in the interpretation of many statutes. PAMDA is no exception. Part 3 of this thesis will examine recent case decisions directly relevant to the interpretation of Chapter 11. The decisions discussed highlight the technical nature of this piece of legislation.

As is the case with other consumer protection legislation,<sup>2</sup> penalties apply for non-compliance with PAMDA. The effects of non-compliance from the perspectives of the seller, buyer, agent and lawyer will be dealt with in Part 4. The legal and real estate industries are the most significantly affected by Chapter 11 of PAMDA. It is the responsibility of lawyers to interpret and ensure compliance with all relevant legislation. However, that cannot be said for real estate agents.

While compliance is expected, it is suggested that the expectation that agents should have a certain expertise in statutory interpretation is unreasonable. This is where the training provided by the Real Estate Industry of Queensland ("REIQ") to agents becomes essential. The extent of the REIQ's training and support for agents is examined in Part 5.

Once the legislation, case law, compliance issues and the REIQ's involvement with PAMDA have been examined, conclusions can then be drawn and recommendations made for future legislative reform. These conclusions and recommendations will be outlined in Part 6.

There has been significant growth in the real estate industry in recent years. In the period 2000 to 2004 the total value of residential building increased from \$4,465,100,000.00 to \$8,993,900,000.00.<sup>3</sup> Notwithstanding the effect of inflation over this period of time, the figures show a steady increase in activity in the residential real estate market. These figures do not take into account the turnover on second hand residential property which is by far the most regularly conveyed property.

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<sup>2</sup> *Trade Practices Act 1974 (Cth)*, ss 75AZC, 75AZD.

<sup>3</sup> Australian Bureau of Statistics, 'National Regional Profile: Queensland', Industry Characteristics Summary released 20.11.2006.

An American study<sup>4</sup> conducted in 1967 by Drs Thomas Holmes and Richard Rahe into the effects of stress ("the Holmes-Rahe Test") ranked changing residence and taking on a mortgage as two of the most stressful events to occur in a person's life. Assuming that this is still the case, those consumers undertaking this stressful exercise require as much assistance and statutory protection as possible to ensure that they emerge from the process relatively unscathed. This is one of the fundamental elements of consumer protection legislation.

One of the first statutes which aimed to promote consumer protection was the *Trade Practices Act 1974* (Cth) ("the TPA").<sup>5</sup> The scope of the TPA is limited when it comes to land transactions. The TPA regulates conduct in certain lease and licence transactions<sup>6</sup> as well as false representations and other misleading or offensive conduct in relation to land.<sup>7</sup>

In the early to mid 1990's Queensland was experiencing a property development boom revealed by annual increases in building activity of 13-15% for the period from 1990 to 1994.<sup>8</sup> As the demand for residential property increased, property prices increased substantially. Consumers were left largely unprotected by legislation, the *Auctioneers and Agents Act 1971* (Qld) ("the AA Act"). The AA Act focussed primarily on agents' commission rates, trust account dealings and conflicts of interest rather than the consumer protection.<sup>9</sup>

Media attention focused on the incidents of over-valuation of investment properties (particularly Gold Coast properties) and the investors who had lost money after buying property through a Marketeering scheme.<sup>10</sup>

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<sup>4</sup> Holmes, T.H. and Rahe, R.H. 'The social readjustment rating scale'. *Journal of Psychosomatic Research*, 11:213-218, 1967.

<sup>5</sup> Earlier legislation includes the *Hire Purchase Act 1959* (Qld) (repealed).

<sup>6</sup> *Trade Practices Act 1974* (Cth) s 4H.

<sup>7</sup> *Trade Practices Act 1974* (Cth) ss 53, 75AD.

<sup>8</sup> Australian Bureau of Statistics, 'Monthly Summary of Statistics Queensland', Catalogue No. 1304.3, March 1994 and January 1999.

<sup>9</sup> National Competition Policy Unit, 'Review of the Auctioneers and Agents Act 1971 and Auctioneers and Agents Regulation 1986' (Issues Paper released Department of Fair Trading, Queensland, February 2000).

<sup>10</sup> Jennifer Sexton, 'Hard-sell leaves buyers beached', *The Australian*, (Sydney), 31 July 1999, 42.



In 1998 an average of \$40,000.00 to \$54,000.00 was paid by buyers above market value for investment properties sold through marketeering schemes.<sup>11</sup> This equated to as much as \$110-\$150 million throughout Queensland in 1998 alone.<sup>12</sup> This created demands for legislative reforms as the AA Act was considered to be unable to properly meet community expectations of consumer protection in this market.<sup>13</sup>

A public forum on Marketeering was convened on the Gold Coast by the Honourable Judy Spence MLA in March of 1999. The result of that forum was the establishment of a Property Marketing Working Party<sup>14</sup> in May of 1999. The Working Party's aim was to identify problems in the property market and to provide appropriate solutions to those problems.<sup>15</sup> Separate from the Working Party, Professor Bill Duncan of the Queensland University of Technology was engaged by the Honourable Judy Spence MLA to prepare a report which examined the AA Act and current industry practices. Professor Duncan was briefed by Ms Spence to -

*"...identify options for the regulation of 'marketeering' activities for inclusion in draft legislation currently being prepared to replace the Auctioneers and Agents Act 1971..."<sup>16</sup>*

The following three reports were tabled in Parliament on 22 July 1999 –

- i. Professor Duncan's report;
- ii. the Working Party Report; and

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<sup>11</sup> Queensland, *Two tier real estate markets in Queensland – Report on an investigation conducted for the Queensland Office of Fair Trading*, Parl Paper No 2070 (1999) Page 3.

<sup>12</sup> Ibid.

<sup>13</sup> Sexton, above n 10, 42.

<sup>14</sup> The working party consisted of –

Ms Rita Malone, a consumer and property buyer  
Mr George Hannaford, Gold Coast Unit Owners Association  
Ms Wendy Cull, a solicitor representing consumers  
Mr Kerry Davis, LJ Hooker Surfers Paradise and Kingslake Holdings  
Mr Karl Sebastian, Surfers Paradise Real Estate  
Mr Bill Bain, The Investors Club  
Mr Gary Bugden, solicitor, representing the Urban Development Institute of Australia (UDIA)  
Mr Randall Warren or alternate from the Australian Property Institute (API)  
Mr Don McKenzie, director, Real Estate Industry of Queensland (REIQ)  
Mr Pter Morgan, Australian Federation of Property Developers and Marketers  
Mr Karl Rameau, Epic Group Pty Ltd  
Mr Iain Herriot, Herriots Valuers Pty Ltd  
Mr Jim Raptis, chairman of Raptis Group Pty Ltd  
Mr Barry Gannon, Property Sales Association of Queensland  
Mr Kevin Sole, Mortgage Industry Association of Australian (Queensland Chapter)

<sup>15</sup> Hon J.C. Spence, 'Property Agents and Motor Dealers Bill, Second Reading Speech', (speech delivered at Queensland Parliament Legislative Assembly, 7 September 2000).

<sup>16</sup> Queensland, *'Marketeering' Regulatory Options for Inclusion in Draft Legislation*, Parl Paper No 2068, (1999) Page 1.

- iii. an Investigative Report on Marketeering Practices by Mr Phil Dickie which was conducted for the Office of Fair Trading.<sup>17</sup>

The reports of the Working Party and Professor Duncan concluded that the AA Act was unable to cope with business practices that had recently emerged within the market, particularly the conduct of marketeers.

It was proposed that new legislation (PAMDA) should provide the consumer protection lacking in the AA Act. In addition to strengthening consumer protection, PAMDA introduced reforms to the licensing systems for traders engaged in the real estate and motor vehicle industries.<sup>18</sup>

PAMDA was designed to deal with the two-tiered marketing systems that were being aggressively pursued in Queensland.<sup>19</sup> These marketing systems were successful on an inter-state level as can be seen from the following extract of an article from *'The Courier Mail'* newspaper –

*"As flights bringing unwitting dupes touch down on the Gold Coast and in Brisbane today, a well-greased machine driving Queensland's most lucrative and best-organised fraud smoothly moves up a gear. The targets, almost always husband-and-wife couples, are arriving from across Australia. And the most crucial stage of a rip-off campaign that began with a telemarketer's unsolicited call -- leading to a friendly seminar in their home-town and a personal presentation on negatively geared investment properties -- is under way. By Sunday afternoon, with deals done after some ruthlessly effective and deceptive marketing, the machine is throttling back. The flights depart. And 75 in every 100 couples -- not wealthy, but gullible working-class folk enmeshed in the machine that moved too quickly for them to get off until it was too late -- return to modest homes in which they typically have less than \$100,000 in equity. In their luggage will be the sales contract for an investment property, perhaps seemingly cheap at \$140,000 and marketed with the promise it will secure their family's financial future. They do not yet know the property was overvalued by about 40 per cent, or that they have been systematically conned."*<sup>20</sup>

There were commissions, consultancy fees and the like being paid to agents, valuers and lawyers at much higher rates than was the current industry standard.<sup>21</sup> These systems were referred to as "the food chain".<sup>22</sup> Many of the parties involved in these transactions were not acting independently.

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<sup>17</sup> Queensland, "Two tier real estate markets in Queensland – Report on an investigation conducted for the Queensland Office of Fair Trading", Parl Paper No 2070, (1999).

<sup>18</sup> *Property Agents and Motor Dealers Act 2000* (Qld), Chapter 2.

<sup>19</sup> Working Party, Parliament of Queensland, *Property Marketing in Queensland – Report of the Working Party – July 1999*, (1999) 2.

<sup>20</sup> Hedley Thomas, 'Inside the Scam', *The Courier Mail*, (Brisbane), 11 August 2001, 30.

<sup>21</sup> Dickie, above n 17, 11.

<sup>22</sup> Dickie, above n 17, 11.

Some lawyers who had regular involvement with this type of transaction were recruited by developers on the understanding that they would act for the buyers of the development lots.<sup>23</sup> This behaviour caused serious concern in the real estate and legal industries, particularly when many of these investors were also mortgaging other property (usually their family home) in order to secure the finance necessary to purchase the investment property.<sup>24</sup>

As can be expected when property has been over-valued, many of the investments did not produce the level of income required to enable the investors to repay the mortgages. When the investment property was put on the market the investor discovered its true market value. Usually there was a significant shortfall owing to the mortgagee after sale.

This deficit is referred to as "the puff" and has been estimated by Herriots Valuers to be approximately \$40,000.00 per transaction.<sup>25</sup> Evidence was given by Mr Dickie in his report of two price lists that existed for off-the-plan sales of one Gold Coast development in 1998.<sup>26</sup> It can be seen from this comparison of the price lists that a significantly higher purchase price is stated in Price List A, presumably the list for marketeering targets, than in Price List B.

Media reports about the marketeering schemes placed pressure on the State Government to stop this type of behaviour<sup>27</sup> by protecting consumers from deception and manipulation. Parliament responded with the relatively hasty drafting and enactment of PAMDA.

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<sup>23</sup> Tim O'Dwyer, 'Conveyancing Solicitor Suspended', The Australian Real Estate Blog, [http://www.lawyersconveyancing.com.au/news/093\\_suspended.asp](http://www.lawyersconveyancing.com.au/news/093_suspended.asp) at 1.

<sup>24</sup> Neil Jenman, 'Excerpt: Investment Traps', (2002) Four Corners, [http://www.abc.net.au/4corners/content/2003/20030421\\_tall\\_stories/jenman.htm](http://www.abc.net.au/4corners/content/2003/20030421_tall_stories/jenman.htm) at 5.

<sup>25</sup> Dickie, above n 17, 13.

<sup>26</sup> Dickie above n 17, 35. See also Appendix H.

<sup>27</sup> Sexton, above n 10, 42.

## PART 1 - PAMDA

### 1. *What is the Object of PAMDA?*

The primary Object of PAMDA s10(1) is to provide a system within the real estate and motor vehicle industries that achieves an appropriate balance between -

- i. the need to regulate for the protection of consumers; and
- ii. the need to promote freedom of enterprise in the market place.

Section 10(2) of PAMDA is more specific, stating that a significant Object of the Act is to –

*“...provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property.”*

Section 10(3)(d) of PAMDA targets marketeers stating that the objects are to be achieved by –

*“providing protection for consumers in their dealings with marketeers...”*

In sections 10(3)(g) and (h) of PAMDA the Objects identify the need for differing levels of enforcement and provide for flexible enforcement measures –

*“...providing for the enforcement of matters involving marketeers by the tribunal and the District Court, and...<sup>28</sup>providing increased flexibility in enforcement measures through codes of conduct, injunctions, undertakings, and for contraventions by marketeers, preservation of assets and civil penalties”<sup>29</sup>*

It is clear that PAMDA was designed to provide consumer protection and to provide serious penalties for non-compliance. There was a perceived need to protect potential victims of marketeers and buyers whose contract resulted from an unsolicited approach.

One reform proposal initially enacted<sup>30</sup> was to invoke a five business day cooling-off period that would be triggered where a buyer was approached by either a developer or a real estate agent and invited to attend a “property information session”.<sup>31</sup>

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<sup>28</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 10(3)(g).

<sup>29</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 10(3)(h).

<sup>30</sup> Spence, above n 15, 3104.

These sessions were designed to induce unwary buyers to purchase residential property touting certain investment and taxation advantages as justification for the investment. However, shortly after it was enacted PAMDA was amended<sup>32</sup> to extend the application of the five business day cooling off period to all residential conveyances, except those properties sold at auction. This had the effect of extending the application of PAMDA and broad consumer protection available to most buyers in the residential real estate market.

In addition to the cooling-off period, Parliament accepted Professor Duncan's recommendation<sup>33</sup> to place a prominent Warning Statement as the first page of every residential contract, except those for properties sold at auction. The purpose of a Warning Statement was to warn buyers of residential property to obtain legal and valuation advice to better understand the nature of their contractual obligations. Buyers were advised to conduct these inquiries during the cooling-off period.

This enabled buyers to avail themselves of the contractual right of termination should it be deemed appropriate. Warning Statements were designed as an integral part of any residential contract. By placing the Statement as the first or top sheet of the contract, it was difficult for marketeers to conveniently "lose" the form or place it among the other pages of the contract.

The Parliamentary Working Party<sup>34</sup> also reported that disclosure by real estate agents and developers to potential buyers was limited. The AA Act failed to address this issue. It was recommended that mandatory disclosure requirements for developers and real estate agents should be introduced.

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<sup>31</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 364.

<sup>32</sup> Reprint 1B, Act 61 of 2001, effective date 29 October 2001

<sup>33</sup> Duncan, above n 16, 37

<sup>34</sup> Above n 14.

The suggested disclosure included any personal or business relationships between the real estate agent or developer and any other person including other real estate agents, mortgage brokers, valuers and lawyers. The Working Party reported to Parliament that the aim of these new disclosure requirements was to better inform consumers “about matters that may artificially affect purchase prices before they enter into binding contracts”.<sup>35</sup>

In addition to the new legislative regime, it was proposed to have specific Codes of Conduct for each of the regulated occupations. A breach of the Code of conduct would be grounds for disciplinary action to be taken by the new Property Agents and Motor Dealers Tribunal. For breaches of the legislation, remedies such as injunctions and enforceable undertakings were suggested as alternatives to prosecution.<sup>36</sup>

## **2. PAMDA - A Brief History**

PAMDA was introduced into Parliament on 7 September 2000 and came into effect on 1 July 2001. As the first amendment of PAMDA commenced on 21 September 2001<sup>37</sup> it is clear legislators quickly realised an integral part of PAMDA's Objects, namely to protect consumers against marketeers, had not been properly addressed by the legislation. Many hasty amendments followed.

The 21 September 2001 amendment included new Objects in sections 10(2) and (3)(d), namely to –

*“...provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property” and to provide “...protection for consumers in their dealings with marketeers”.*

PAMDA has always had a number of specific documentary requirements for which real estate agents and lawyers are responsible. For the first two years of its life, PAMDA underwent a series of frequent, and sometimes radical, amendments.

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<sup>35</sup> Spence, above n 15, 3104.

<sup>36</sup> *Property Agents and Motor Dealers Bill 2000 (Qld)*, Explanatory Notes, p 4.

<sup>37</sup> Reprint 1A, Act 61 of 2001.

As a result of these amendments, there have been many different versions of the forms used for residential property transactions as illustrated in the diagram<sup>38</sup> below -

Form:	History		
	Version:	Effective:	Replaced/revoked:
Form PAMD 26 – Appointment to Act as Pastoral House (cont')	Form 26 v.3	1 July 2005	10 August 2008
	There is no version 2 of this form		
	Form 26 v.1	1 July 2001	1 October 2005
Form PAMD 27c – Selling Agent's Disclosure to Buyer	Version:	Effective:	Replaced/revoked:
	Form 27c v.3	4 February 2008	Current
	Form 27c v.2	15 May 2005	1 April 2008
	Form 27c v.1	7 February 2005	19 June 2005
	Form 27b v.2	31 May 2002	8 May 2005
	Form 27b v.1	8 April 2002	31 May 2002
	Form 27a v.1	29 October 2001	8 April 2002
	Form 27	1 July 2001	29 October 2001
Form PAMD 28 - Disclosure of Beneficial Interest to Seller	Version:	Effective:	Replaced/revoked:
	Form 28 v.4	4 February 2008	Current
	Form 28 v.3	1 July 2005	1 April 2008
	Form 28 v.2	2 February 2004	1 October 2005
Form PAMD 29 – Warning Statement <i>No longer in effect</i>	Version:	Effective:	Replaced/revoked:
	Form 29 v.1	1 July 2001	29 October 2001
Form PAMD 30c – Warning Statement	Version:	Effective:	Replaced/revoked:
	Form 30 c v.4	4 February 2008	Current
	Form 30c v.3	1 July 2005	1 April 2008
	Form 30c v.2	7 February 2005	1 October 2005
	Form 30c v.1	3 February 2003	8 May 2005
	Form 30b v.1	2 July 2002	1 May 2003
	Form 30a v.2	31 May 2002	2 July 2002
	Form 30a v.1	29 October 2001	31 May 2002
	Form 30	1 July 2001	29 October 2001
Form PAMD 31 – Declaration by Seller <i>No longer in effect</i>	Version:	Effective:	Replaced/revoked:
	Form 31a v.1	29 October 2001	24 April 2002
	Form 31 v.1	1 July 2001	29 October 2001
Form PAMD 32a – Lawyer's Certification	Version:	Effective:	Replaced/revoked:
	Form 32a v.5	4 February 2008	Current
	Form 32a v.4	1 July 2005	1 April 2008
	Form 32a v.3	19 January 2004	1 October 2005
	Form 32a v.2	12 July 2002	19 January 2004
	Form 32a v.1	29 October 2001	12 July 2002
	Form 32 v.1	1 July 2001	29 October 2001

Of the various forms prescribed by PAMDA, the Forms 29 and 31 were short-lived. The Form 31 was required pursuant to section 365(b) (as it was then) which required the seller to provide the buyer with a declaration (Form 31) declaring the date on which the seller signed the contract. The date of delivery of this declaration was deemed by PAMDA<sup>39</sup> to be the date upon which the buyer was bound under the contract.

<sup>38</sup> History of PAMD forms as at December 2008 provided by Department of Justice and Attorney-General.

<sup>39</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 365(a).

The Form 31 came into force with PAMDA on 1 July 2001. It was amended on 29 October 2001 and was replaced with Form 31a.<sup>40</sup> The Form 31a was short-lived. It was revoked on 24 April 2002. It is suggested that while the concept of the legislation was sound to begin with, the mechanics of putting that concept into operation were significantly more difficult than anticipated. Other forms introduced with PAMDA including Forms 27<sup>41</sup> and 32<sup>42</sup> managed greater longevity and have survived, with some amendments, to the present time.

On 1 December 2005 the 16<sup>th</sup> amendment of PAMDA came into effect ("the 2005 amendments"). For a piece of legislation that has been in place for less than seven years, the number of amendments that have been necessary is staggering. The series of rapid amendments early in the life of PAMDA are a testament to the initial practical difficulties of implementing this complex piece of legislation. Unfortunately, rather than these amendments smoothing the way for future transactions, PAMDA remains rocky terrain for lawyers and real estate agents.

The 2005 amendments dramatically altered Chapter 11 of PAMDA. New processes were introduced for the submission of both proposed and relevant contracts. These processes will be examined in Part 2 of this paper. The 2005 amendments also brought with them a significant change in the rights of buyers and the responsibilities of sellers of residential property in Queensland. Those rights will be discussed in Part 4 of this paper.

Of particular interest are PAMDA's requirements concerning preparation and submission of contracts to buyers. Since the 2005 amendments, there has been unease in the legal and real estate industries in relation to the practical difficulties of complying with Chapter 11. It is suggested that lawyers and real estate agents are left to wonder what is next for this complex and confusing Act. The question arises whether, particularly with introduction of the 2005 amendments, the legislators have lost sight of the original Objects of the Act itself?

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<sup>40</sup> Refer to Appendix F.

<sup>41</sup> Selling Agent's Disclosure to Buyer – now Form 27c with version 3 of that form effective 4 February 2008, refer to Appendix B.

<sup>42</sup> Lawyer's Certification – now Form 32a with version 5 effective 4 February 2008, refer to Appendix G.



### **3. PAMDA - Its Application in Queensland Conveyancing**

PAMDA regulates a large percentage of contracts for the sale of residential property in Queensland.

"Residential Property" is defined as –

- "(a) a single parcel of land on which a place of residence is constructed or being constructed; or*
- (b) a single parcel of vacant land in a residential area."*<sup>43</sup>

The definition includes residential lots included in a Community Titles Scheme or a proposed Community Titles Scheme, lots or proposed lots under the *Building Units and Group Titles Act 1980* and leasehold lots registered under the *South Bank Corporation Act 1989*.<sup>44</sup>

A "Relevant Contract" is defined as –

*"...a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction".*<sup>45</sup>

A "Proposed Relevant Contract" is a Relevant Contract which is yet to be signed. The proposed relevant contract can take the form of an unsigned contract containing the necessary contract particulars. Alternatively, a proposed relevant contract can be an offer, signed by a prospective buyer, to purchase specific residential property.

Note that residential properties sold at auction are not covered by Chapter 11 of PAMDA. It is suggested that the rationale for this legislative decision is that Sellers spend considerable time and money arranging for a property to be sold at auction. Some of the preliminary steps taken before auction include committing to extensive and expensive advertising campaigns.

If a cooling-off period was given to buyers of residential property sold at auction then the effect could be potentially disastrous for the seller. If the buyer were to "cool off" the seller would stand to lose the benefit of the marketing and would still be responsible for the costs of auctioning the property.

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<sup>43</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 17(1).

<sup>44</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 17(2).

<sup>45</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 364.

Where properties are listed with real estate agents for sale by private treaty, the advertising of the property is generally not as intense of that of an auction and is more ongoing in nature. In this respect, it is easier and less costly for a seller to obtain an alternate contract on a property if a buyer "cools off".

Further, in the lead up to an auction potential bidders are usually given an opportunity to conduct certain due diligence enquiries in relation to the property.<sup>46</sup> These due diligence enquiries would usually include an independent valuation of the property and a building and pest inspection<sup>47</sup>. This enables a bidder to attend an auction armed with a certain level of knowledge of the property.

In contrast to the auction scenario, for private treaty sales these due diligence enquiries are not usually available to a buyer before the contract is signed. For private treaty sales, it is expected that the contract will contain certain conditions covering these matters.

In fact, the standard REIQ Contract for Houses and Land<sup>48</sup> and REIQ Contract for Residential Lots in a Community Title Scheme<sup>49</sup> both contain provision in the Contract Reference Schedule for a building and pest inspection and for finance approval to be obtained. The inclusion of these conditions as standard reinforces the view that due diligence is expected in private treaty sales to be conducted after the contract becomes binding.

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<sup>46</sup> REIQ, *'Understanding the auction process'* (2007) < <http://www.ourbrisbane.com/living/homes/articles/auction-process.htm> >

<sup>47</sup> *ibid*

<sup>48</sup> 6<sup>th</sup> edition

<sup>49</sup> 2<sup>nd</sup> edition

## PART 2 - CHAPTER 11

### 4. *What is the Purpose of Chapter 11?*

The purpose of Chapter 11 is particularised in s363 of PAMDA –

- “(a) to give persons who enter into relevant contracts a cooling-off period; and*
- (b) to require all proposed relevant contracts or relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that a relevant contract is subject to a cooling-off period; and*
- (c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers.”*

At the time of its enactment, PAMDA only intended to provide cooling-off periods to buyers of residential property who had entered into the contract as a result of an unsolicited invitation to attend a property information session. At 1 July 2001, the purposes of Chapter 11 were –

- “(a) to give persons who enter into relevant contracts a cooling-off period; and*
- (b) to require all contracts for the sale of residential property in Queensland to include consumer protection information, including a statement about whether or not the contract is subject to a cooling-off period.”<sup>50</sup>*

Section 364 as it read when PAMDA commenced defined these contracts as “relevant contracts”. Recognising that there were many contracts for the purchase of residential property that were not “relevant contracts”, it was necessary to provide buyers under these other contracts with consumer protection information, even if they did not obtain the benefit of a cooling-off period.

In a practical sense providing the correct information to buyers meant that more than one form of Warning Statement was required. The first of these Warning Statements was the Form 30a<sup>51</sup> which was attached to “relevant contracts” and provided the buyer with a cooling-off period. The second Warning Statement was the Form 29<sup>52</sup>. This form was attached to all other contracts for residential property other than “relevant contracts”, except contracts for property sold at auction. The Form 29 provided consumer protection information but did not allow a cooling-off period.

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<sup>50</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 363 as enacted at 1 July 2001.

<sup>51</sup> Refer to Appendix E.

<sup>52</sup> Refer to Appendix C.

The use of two Warning Statements led to much confusion and uncertainty in the legal and real estate industries, particularly when the wrong form was attached to the contract<sup>53</sup>. There were instances when buyers under a contract that was not a “relevant contract” purported to exercise a right to cool off because the Form 30a had been attached as the first page of the contract, not the correct Form 29. Similarly, there were situations where a Form 29 had been used when it should have been a Form 30a.

In these situations, sellers could claim that there was no cooling-off period and if the buyer purported to cool off and terminate the contract the seller treated this as a repudiation of contract and sought to forfeit the buyer’s deposit.<sup>54</sup> For a few months after PAMDA came into force the legal and real estate industries battled with compliance issues. One particular difficulty faced by the legal industry was the lack of certainty of the legal position in those instances where a Warning Statement had been placed on the contract but it was in the incorrect form.<sup>55</sup> The only remedy was section 367 which allowed a buyer to terminate the contract if the incorrect Warning Statement was used –

**“367 Buyer’s rights if warning statement not given**

- (1) *This section applies to a contract to which a warning statement must be attached.*
- (2) *If a warning statement is not attached to the contract or is of no effect under section 366(5), the buyer under the contract may terminate the contract at any time before the contract settles by giving signed, dated notice of termination to the seller or the seller’s agent.*
- (3) *The notice of termination must state that the contract is terminated under this section.*
- (4) *If the contract is terminated, the seller must, within 14 days after the termination, refund any deposit paid under the contract to the buyer.  
Maximum penalty — 200 penalty units.*
- (5) *If the contract is terminated, the seller and the person acting for the seller who prepared the contract are liable to the buyer for the buyer’s reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract.*
- (6) *If more than 1 person is liable to reimburse the buyer, the liability of the persons is joint and several.*
- (7) *An amount payable to the buyer under this section is recoverable as a debt.*<sup>56</sup>

While PAMDA provided limited consumer protection, a broader scope was necessary. Sections 363 and 364 were amended into their current forms on 29 October 2001. Section 364 now defines a “relevant contract” as –

*“...a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction.”*

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<sup>53</sup> Sharon Christensen, ‘A tighter act to follow for homebuyer protection’, (2001) September *Proctor*, 25, 28.

<sup>54</sup> Christensen, above n 51, 25, 28.

<sup>55</sup> Christensen, above n 59, 25, 28.

<sup>56</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 367 as enacted at 1 July 2001.

PAMDA's Explanatory Notes<sup>57</sup> specifically refer to the necessity for inclusion of consumer protection information in contracts for the sale of residential land. All contracts for the sale of residential land in Queensland, other than those formed when a property is sold at auction, are now subject to a five business day cooling-off period which will be discussed below.

Consumer protection remains one of the fundamental purposes of Chapter 11. Extending the consumer protection aspect of Chapter 11, the independence of lawyers was deemed worthy of specific regulation hence the inclusion of section 363(c).<sup>58</sup> The inclusion of this specific provision acknowledges attempts to stop the social mischief of consumer deception which was unchecked during the height of the marketeering operations in Queensland.

## 4.1 Cooling-Off Period

The first purpose<sup>59</sup> of Chapter 11 has certainly been achieved. All buyers of residential property contracted for sale by private treaty now have the benefit of a 5 business day cooling-off period. If a buyer "cools off" during this period and terminates the contract then they may be liable, at the discretion of the seller, to pay a termination penalty. This penalty is payable to the seller and is equivalent to 0.25% of the purchase price listed in the relevant contract. The cooling-off provisions appear in sections 368, 369 and 370 of PAMDA –

- "368 Terminating relevant contract during cooling-off period**
- (1) *A buyer under a relevant contract who has not waived the cooling-off period for the relevant contract may terminate the relevant contract at any time before the cooling-off period ends by giving a signed, dated notice to the seller or the seller's agent indicating that the buyer terminates the relevant contract.*
  - (2) *If notice of termination is given under subsection (1), the relevant contract is at an end.*
  - (3) *The seller must, within 14 days after the relevant contract is terminated, refund any deposit paid under the relevant contract to the buyer less the amount of the termination penalty.*  
*Maximum penalty—200 penalty units.*
  - (4) *An amount payable to the buyer under subsection (3) is recoverable as a debt."*

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<sup>57</sup> *Property Agents and Motor Dealers Bill 2000*, Chapter 11, Part 1, cl 363

<sup>58</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 363(c) –  
"*...to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers.*"

<sup>59</sup> To provide buyers with a cooling-off period

The introduction of a cooling off period for buyers was seen as a mechanism to allow a buyer to reconsider their decision to enter into the contract. Many people tend to become caught up in the heat of the moment when buying property, especially in a very active or “hot” property market. It is not until contracts are signed that buyers sometimes realise the full legal implications of their actions.

The cooling off period allows buyers to withdraw from the contract with minimal financial loss. As mentioned above, the termination penalty is imposed at the discretion of the seller. The seller may choose not to impose the penalty, effectively freeing the buyer from the contract without any penalty whatsoever.

The purpose of the termination penalty is to stop buyers abusing the true purpose of the cooling off period, namely giving buyers an opportunity to obtain an independent valuation of the property and independent legal advice regarding the contract. At the time PAMDA was introduced there was a flurry of activity in the real estate industry. Property prices were on the increase, market activity was frantic and if a buyer failed to act quickly they would often lose the opportunity to secure a contract over their preferred or chosen property.

The cooling off period initially created a practice of buyers inspecting a number of properties on the same day and making offers to purchase a one or more of those properties. If more than one of the offers was accepted (and in many instances this happened), the buyer could use the cooling-off period to choose which of the contracts they wanted to proceed with.

Sellers were disadvantaged because often they refused other offers and then a few days later the buyer cooled off. When this happened the seller was left to re-advertise the property and repeat the marketing procedure again. This meant more time and expense for the seller. The termination penalty was introduced to impose a financial penalty on buyers who took advantage of the cooling off period and used it simply as a means of avoiding a contract they no longer wanted to proceed with.

The termination penalty was designed to discourage buyers from taking advantage of the cooling-off period. By giving the sellers the option to charge a penalty buyers were encouraged to think more carefully before signing a contract. Sellers who were the subject of a contract where the buyer "cooled off" were able to obtain some level of compensation for their wasted time and effort.

PAMDA also allows buyers the choice to shorten or waive the cooling-off period. It is suggested that the ability to shorten or waive the cooling-off period was included to give the buyer more bargaining power in contract negotiations. The relevant provisions appear in sections 369 and 370 of PAMDA –

**"369   Waiving cooling-off period"**

- (1) *A buyer who proposes to enter into a relevant contract may waive the cooling-off period for the relevant contract by giving the seller under the proposed relevant contract or the seller's agent a lawyer's certificate in the approved form.*
- (2) *The buyer may waive the cooling-off period only if the certificate is given to the seller or the seller's agent before the buyer is bound by the relevant contract.*
- (3) *The lawyer's certificate must be signed and dated by the lawyer giving the certificate and confirm the following by stating—*
  - (a) *the lawyer is independent of the seller, the seller's agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in connection with the sale, of the property and has no business, family or other relationship with any of those persons;*
  - (b) *the lawyer has not received, is not receiving, or does not expect to receive a benefit in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property, other than professional costs and disbursements payable by the buyer;*
  - (c) *the lawyer has explained to the buyer—*
    - (i) *the effect of the relevant contract; and*
    - (ii) *the purpose and nature of the certificate; and*
    - (iii) *the legal effect of the buyer giving the certificate to the seller or the seller's agent.*
- (4) *In this section—  
benefit means monetary or other benefit.*

**370   Shortening cooling-off period**

- (1) *A buyer under a relevant contract may shorten the cooling-off period for the relevant contract by giving the seller under the relevant contract or the seller's agent a lawyer's certificate in the approved form.*
- (2) *The lawyer's certificate must be signed and dated by the lawyer giving the certificate and confirm the following by stating—*
  - (a) *the lawyer is independent of the seller, the seller's agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in connection with the sale, of the property and has no business, family or other relationship with any of those persons;*
  - (b) *the lawyer has not received, is not receiving, or does not expect to receive a benefit in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property, other than professional costs and disbursements payable by the buyer;*
  - (c) *the lawyer has explained to the buyer—*
    - (i) *the effect of the relevant contract; and*
    - (ii) *the purpose and nature of the certificate; and*
    - (iii) *the legal effect of the buyer giving the certificate to the seller or the seller's agent.*
- (3) *The giving of a lawyer's certificate under this section is effective to shorten the period to 5p.m. (or another stated time) on the day stated in the certificate.*
- (4) *In this section—  
benefit means monetary or other benefit."*

Note that the buyer must obtain legal advice prior to shortening or waiving the cooling-off period. It is suggested that the requirement for the shortening or waiver of the cooling-off period to be effected via the Lawyers' Certificate ensures that the buyer is fully aware of the legal consequences of their actions.

## 4.2 Inclusion of Consumer Protection Information in Contracts

The purpose of Chapter 11 appears to be clear. The provisions of Chapter 11 relating to notification of the existence of a cooling-off period<sup>60</sup> were drafted clearly and concisely. Issues have arisen, not with the wording of the legislation but with the prescribed manner in which the appropriate notice<sup>61</sup> was delivered to the seller. Rather than simplifying the procedures for compliance, the legislators chose to amend the legislation. Section 365 has been significantly amended as can be seen from the extracts of that section as it was first enacted –

***“365 When buyer is bound under a relevant contract***

*A buyer is bound under a relevant contract when the buyer gives the seller under the contract or the seller's agent—*

- (a) a copy of the contract signed by both the buyer and the seller; and*
- (b) a notice in the approved form signed and dated by the seller declaring the date on which the seller signed the contract.”*

and as it now appears -

***“365 When parties are bound under a relevant contract***

*(1) The Buyer and the Seller under a relevant contract are bound by the relevant contract when—*

- (a) for a relevant contract, other than a relevant contract relating to a unit sale - the Buyer or the Buyer's Agent receives the warning statement and the relevant contract from the Seller or the Seller's Agent in a way mentioned in subsection (2); or*
- (b) for a relevant contract relating to a unit sale - the Buyer or the Buyer's Agent receives the warning statement, the information sheet and the relevant contract in a way mentioned in subsection (2A).*

*Note—*

*See the Electronic Transactions (Queensland) Act 2001, section 11 for a requirement about consent and section 24 for rules about when an electronic communication is received.*

*(2) For a relevant contract, other than a relevant contract relating to a unit sale, the ways are—*

- (a) by fax, but only if the documents mentioned in subparagraphs (i), (ii), (iii) and (iv) are sent in the following order—*
  - (i) a single cover page that includes a clear statement directing the attention of the Buyer or the Buyer's Agent to the warning statement and the relevant contract;*
  - (ii) the warning statement;*
  - (iii) the relevant contract;*
  - (iv) any other documents; and*
- (b) by electronic communication other than fax, if the electronic communication contains—*
  - (i) a message that includes a clear statement directing the attention of the Buyer or the Buyer's Agent to the warning statement and the relevant contract; and*

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<sup>60</sup> s 365.

<sup>61</sup> Form 31 Declaration by Seller (as it was then)



- (ii) *a single document, consisting only of the warning statement and the relevant contract, that is protected against unauthorised change, with the warning statement appearing as the first or top page of the document; and*  
*Example of electronic communication—*
      - *email*
  - (c) *by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii) and (iii) other than by electronic communication, if—*
    - (i) *the warning statement is attached to the relevant contract and appears as the first or top page; and*
    - (ii) *the Seller or the Seller's Agent directs the attention of the Buyer or the Buyer's Agent to the warning statement and the relevant contract.*  
*Example of receipt other than by electronic communication—*
      - *post**Examples of how attention may be directed—*
      - *by oral advice*
      - *by including a paragraph in an accompanying letter"*
- (2A) *For a relevant contract relating to a unit sale, the ways are—*
- (a) *by fax, but only if the documents mentioned in subparagraphs (i), (ii), (iii), (iv) and (v) are sent in the following order—*
    - (i) *a single cover page that includes a clear statement directing the attention of the Buyer or the Buyer's Agent to the warning statement, the information sheet and the relevant contract;*
    - (ii) *the warning statement;*
    - (iii) *the information sheet;*
    - (iv) *the relevant contract;*
    - (v) *any other documents; and*
  - (b) *by electronic communication other than fax, if the electronic communication contains—*
    - (i) *a message that includes a clear statement directing the attention of the Buyer or the Buyer's Agent to the warning statement, the information sheet and the relevant contract; and*
    - (ii) *a single document, consisting only of the warning statement, the information sheet and the relevant contract, that is protected against unauthorised change, with the warning statement appearing as the first or top page of the document and the information sheet appearing immediately after the warning statement; and*  
*Example of electronic communication—*
      - *email*
  - (c) *by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii), (iii) and (iv) other than by electronic communication, if—*
    - (i) *the warning statement and the information sheet are attached to the relevant contract with the warning statement appearing as the first or top page of the document and the information sheet appearing immediately after the warning statement; and*
    - (ii) *the Seller or the Seller's Agent directs the attention of the Buyer or the Buyer's Agent to the warning statement, the information sheet and the relevant contract.*  
*Example of receipt other than by electronic communication—*
      - *post**Examples of how attention may be directed—*
      - *by oral advice*
      - *by including a paragraph in an accompanying letter*
- (3) *Without limiting how the Buyer may withdraw the offer to purchase made in the contract form, the Buyer may withdraw the offer at any time before being bound by the relevant contract under subsection (1) by giving written notice of withdrawal, including notice by fax, to the Seller or the Seller's Agent.*
- (4) *For this section, a thing sent by fax is taken to be received by the person to whom it is sent if the sender's fax machine indicates that transmission has been successful.*
- (5) *If a dispute arises about when the Buyer and the Seller are bound by the relevant contract, the onus is on the Seller to prove when the parties were bound by the relevant contract.*
- (6) *In this section—*  
*Buyer's Agent includes a Lawyer or licensee acting for the Buyer and a person authorised by the Buyer or by law to sign the relevant contract on the Buyer's behalf."*

It is suggested that these amendments have resulted in this section of the legislation being confusing and difficult to comply with.

The one constant in Chapter 11 has been the inclusion of a Warning Statement in some form. The difficulty however has been making buyers aware of the importance of the contents of the Warning Statement. Feedback from property buyers<sup>62</sup> reveals a trend of Agents “glossing” over the Warning Statement contents.

One Gold Coast firm<sup>63</sup> queried some of its contacts within the real estate industry as to whether agents properly explained the contents and importance of the Warning Statement<sup>64</sup>. The agents’ response was affirmative.

Relying on the response of the agents interviewed, it is suggested that agents believe they are properly explaining the Warning Statement. However, it is further suggested that buyers feel that, when signing contract documents, they are not fully appreciative of the importance of the Warning Statement and the level of consumer protection it represents.

PAMDA certainly aims to give consumers protection against unsavoury practices and undue pressure to contract but how effective is that protection if the consumers are not made properly aware of its extent? With the availability of information online, consumers are now able to research the law and inform themselves of their rights better than ever before. Despite this and regardless of the ready availability of information, consumer knowledge should never be presumed.

It is suggested that buyers require more detailed information regarding the various aspects of the Warning Statement and the consumer protection rights that flow from it. If the information cannot be obtained at the time of signing the contract then the lawyers must set out to provide more information to the client at the time of receipt of the contract. This action will ensure that clients fully understand their rights before the cooling-off period expires.

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<sup>62</sup> Information obtained from Johnson Property Lawyers, Broadbeach Waters.

<sup>63</sup> Johnson Property Lawyers, Broadbeach Waters

<sup>64</sup> Interview with Scott Dytter of Dytter & Yates Real Estate (Personal interview, 26 April 2006); interview with Grant Stephens of Harcourts Real Estate Broadbeach (Personal interview, 26 April 2006).

### 4.3 Independence of Lawyers

While PAMDA does not seek to prohibit business relationships being formed between lawyers and other parties, including developers, a need for disclosure of those relationships to buyers exists. During the height of Queensland's two-tiered marketing schemes in the late 1990's law firms were retained by developers to act for buyers of lots in these developments.<sup>65</sup> While the firms were not acting for the developers in a formal capacity there were usually benefits to be had, in the form of higher professional costs, where that firm acted for the buyers referred by the developer.

A number of factors in the property development industry prompted legislative intervention. Firstly, the apparent lack of independence of lawyers was seen as important, not only from an ethical standpoint but also from a consumer protection view. Of particular concern was the absence of any regulation requiring disclosure of the relationship between lawyers and developers.<sup>66</sup>

When PAMDA was enacted, these independence problems were addressed by including provision for lawyers to disclose any relevant information by the giving of a lawyer's certificate. Section 365B of PAMDA particularises the requirements for the provision of a lawyer's certificate –

***“365B Lawyer's disclosure to buyer about independence***

- (1) This section applies if a buyer or prospective buyer (buyer) engages a lawyer in relation to the purchase or proposed purchase of a residential property under a relevant contract or a proposed relevant contract.*
- (2) The lawyer must give the buyer a lawyer's certificate in the approved form and explain to the buyer the purpose and nature of the certificate.*
- (3) The lawyer's certificate must be signed and dated by the lawyer and must state—*
  - (a) whether the lawyer is independent of the seller, the seller's agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in connection with the sale, of the property and whether the lawyer has a business, family or other relationship with any of those persons; and*
  - (b) whether the lawyer has received, is receiving, or expects to receive a benefit in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property, other than professional costs and disbursements payable by the buyer; and*
  - (c) the lawyer has explained to the buyer the purpose and nature of the certificate.*
- (4) In this section—*  
*benefit means monetary or other benefit.”*

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<sup>65</sup> Dwyer, above n 23, 1.

<sup>66</sup> Working Party, above n 19, 2.

The Form 32a<sup>67</sup> Lawyers Certificate was introduced as the standard for disclosure of any business relationships the buyer's lawyer may have. The disclosure obligations now in place under PAMDA are very far reaching and lawyers must disclose all potential relationships to their clients.

The Lawyer's Certificate requires the buyer's lawyer to disclose any benefit they may receive, or business, family or other relationship<sup>68</sup> they may have, with the seller or any other person connected with the contract. The disclosure requirement extends to include arrangements with real estate agents, insurers, marketing companies and the like.

It is important to note that there is no prohibition on lawyers being associated with people connected with the contract or receiving a benefit (other than professional costs) from someone connected with the contract. The purpose of Chapter 11 is primarily to ensure that the buyer of residential property receives adequate disclosure of these relationships and can choose whether to retain a lawyer who has disclosed any of these relationships.

In the context of the transaction the current form of disclosure adequately ensures that buyers are able to seek independent representation. If the solicitor retained by a buyer discloses an association then it is the buyer's prerogative to seek alternate representation if they deem that action appropriate.

## **5.     *The Evolution of Chapter 11***

The 2005 amendment is an attempt to repair the quagmire that is Chapter 11. Strangely, these amendments were enacted under the "*Liquor and Other Acts Amendment Act 2005*" and could easily have been overlooked by most lawyers.

Until 2005, despite a number of administrative amendments, Chapter 11 had remained relatively unchanged since PAMDA's commencement in July 2001.

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<sup>67</sup> Refer to Appendix G.

<sup>68</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 365B(3).

Various administrative changes were made, primarily in relation to the forms prescribed for use, but the legislative content was virtually untouched. It is suggested that Chapter 11 should have remained untouched. The 2005 amendments have had the effect of reducing Chapter 11 to a technical minefield with lawyers and real estate agents becoming subject to substantial fines if the provisions are not complied with.<sup>69</sup> The technicalities of Chapter 11 are discussed below.

While it is readily acknowledged that the ultimate object of PAMDA is consumer protection, it is difficult to reconcile this object with Chapter 11 as it currently stands. The Chapter is difficult to comply with in practice and appears to have been amended to protect buyers only. If PAMDA is not complied with, sellers are left in a perilous situation, waiting to see whether the buyer will exercise their right to withdraw from the Contract. It is suggested that this is not fair consumer protection.

While it is acknowledged that PAMDA was originally introduced to protect buyers from unscrupulous marketeers, sellers are also consumers and require protection from buyers who seek to rely on a technical argument as the basis for avoiding their contractual responsibilities. Chapter 11 leans heavily in favour of buyers. It is suggested that the legislators have lost sight of the fact that it is not only buyers who are consumers, but sellers also.

## **6. *When are Parties Bound?***

PAMDA addresses the submission of relevant contracts and proposed relevant contracts in reverse order. This causes confusion when reading the legislation. Section 365 extracted in 4.2 above addresses when the parties are bound under a relevant (signed) contract. Section 366 addresses the submission of proposed<sup>70</sup> relevant contracts. Section 366 will be examined in detail shortly.

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<sup>69</sup> *Property Agents and Motor Dealers Act 2000* (Qld) ss 366(4), 366A(5), 366B(3), 366B(6).

<sup>70</sup> A proposed relevant contract is a draft contract signed by one party, usually the buyer, and submitted to the other party for signature.

It is suggested that the legislation should first address the construction and submission of proposed relevant contracts then address the construction and submission of relevant contracts.

The backwards approach of PAMDA has created huge confusion within the real estate industry.<sup>71</sup> By putting these sections in reverse order, the legislators have made Chapter 11 quite difficult for non-lawyers, particularly real estate agents, to interpret properly. It is suggested that if the legislation cannot be properly interpreted by all those who must deal with it (including real estate agents) then compliance issues will arise.

Real estate agents receive limited training and instruction from the REIQ in the area of contract preparation.<sup>72</sup> It is suggested that further training of agents is not the answer to the Chapter 11 compliance problems. Agents are not lawyers and they should not be expected to have any expertise in preparing contracts. It is suggested that the responsibility for preparation and submission of contracts should rest with lawyers, not real estate agents. Notwithstanding that suggestion, it is not intended to address this in further detail at this time.

Section 365 of PAMDA permits various methods of submission of a relevant contract to the buyer by the seller or the seller's agent. In order to maintain harmony with the application of the *Body Corporate and Community Management Act 1997*, PAMDA<sup>73</sup> distinguishes between relevant contracts relating to residential unit sales and relevant contracts for all other residential property.

The distinction for residential unit sales provides for the inclusion of the appropriate Body Corporate Warning Statement<sup>74</sup> to be inserted in the contract immediately following the PAMDA Warning Statement. This requirement will be discussed in further detail in 6.2 below.

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<sup>71</sup> Above n 70.

<sup>72</sup> Professional Development provided by the Real Estate Institute of Queensland Course Information brochure current as at 5 December 2006.

<sup>73</sup> S 365.

<sup>74</sup> *Body Corporate and Community Management Act 1997* (Qld) s 213.

## **6.1 Relevant Contracts for Residential Properties not including Residential Units**

In relation to contracts for properties other than residential units, PAMDA stipulates<sup>75</sup> that contracts can be submitted in a number of ways. Acceptable methods include facsimile, electronic communication other than facsimile, personally handing the contract to the recipient, post, courier or other means of delivery. At the time of submitting the contract, the seller or the seller's agent must include with the contract –

*"...a clear statement directing the attention of the buyer or the buyer's agent to the Warning Statement and the relevant contract."*<sup>76</sup>

There are a number of suggested methods for conveying this warning. The statement should be included into correspondence accompanying the contract, if posted or faxed. If email is the preferred method of communication then it is suggested that the statement should appear in the body of the email, not in an attachment.

When personally delivering a contract the person responsible for delivery could give the statement verbally. There is no legislative requirement that the statement be given in writing when personally delivering a contract. However, it is suggested that covering correspondence containing the statement should accompany the contract documents. Implementing this suggestion would ensure that there is no doubt that the appropriate statement was given to the buyer or the buyer's agent.

## **6.2 Relevant Contracts for Residential Units**

Relevant contracts for residential units should be submitted using the same methods as relevant contracts for other residential property. Notwithstanding this, there are two significant differences in the composition and compilation of house and land contracts and residential unit contracts.

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<sup>75</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 365(2).

<sup>76</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 365(2).

For residential unit contracts there are additional requirements with which the seller must comply, namely –

- i. the Body Corporate Disclosure Statement<sup>77</sup> must be signed by the buyer before any other documentation is submitted to the buyer for signing; and
- ii. at the time of submitting the relevant contract to the buyer or the buyer's agent the body corporate information sheet<sup>78</sup> must immediately follow the Form 30c Warning Statement and appear immediately above the body of the relevant contract. This information sheet is known as a Form 14 Body Corporate Warning Statement.<sup>79</sup>

Note that the term "Buyer's Agent" is defined in s365(6) to include –

*"...a lawyer or licensee acting for the buyer and a person authorised by the buyer or by law to sign the relevant contract on the buyer's behalf."*

This definition conflicts with the law of agency.<sup>80</sup> Agency recognises that, unless specifically appointed, a lawyer does not have authority to bind a client. Specifically, current business practice reflects<sup>81</sup> that there are many instances in which a client does not usually sign a Client Agreement to formally retain a lawyer until the contract has been signed. It is suggested that in the absence of a retainer the lawyer is not, in the strict legal sense, the agent of the buyer.

Pursuant to PAMDA however, a lawyer who receives a properly submitted contract on a buyer's behalf is the "Buyer's Agent" and as such binds the buyer to the contract. In the case of a contract posted or faxed to a lawyer, it is suggested that the lawyer has no choice whether to agree to accept the contract or not. By the time the lawyer is in possession of the document, delivery is a *fait accompli* and the buyer is bound. While this may not seem to be a matter of great importance, it must be remembered that the cooling-off period commences when the buyer is bound by the contract.

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<sup>77</sup> *Body Corporate and Community Management Act 1997* (Qld) s 206.

<sup>78</sup> *Body Corporate and Community Management Act 1997* (Qld) s 213.

<sup>79</sup> Refer to Annexure "I".

<sup>80</sup> *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644.

<sup>81</sup> Queensland Conveyancing Protocol, 'Protocol Compliance Checklist 6, Acting for the Buyer of Residential Property – Solicitor Engaged after Contract Signed by Buyer', 21 August 2006.



It is only in cases of email and personal delivery that the lawyer has the ability to refuse to accept the contract on the buyer's behalf. Section 11 of the *Electronic Transactions (Queensland) Act 2001* requires consent to be obtained from the intended recipient of an electronic communication before the communication itself is dispatched –

- \*11 Requirement to give information in writing**
- (1) *If, under a State law, a person is required to give information in writing, the requirement is taken to have been met if the person gives the information by an electronic communication in the circumstances stated in subsection (2).*
- (2) *The circumstances are that—*
- (a) *at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and*
- (b) *the person to whom the information is required to be given consents to the information being given by an electronic communication.*"

It is suggested that this is the only point in time that email delivery of the contract can be refused. The specific requirements for electronic transactions and the application of the ETA will be discussed further in 7.2 below.

If the contract is forwarded to the buyer's agent and not the buyer personally then, in some circumstances,<sup>82</sup> the buyer may not be aware that they are bound under the contract until part or all of the cooling-off period has elapsed.

It is suggested that this situation could have serious legal and financial implications for a buyer who is waiting until the contract becomes binding to undertake a valuation of the property and seek legal advice. This situation could also have serious consequences for lawyer who received the contract. It is suggested that the lawyer would be negligent if they failed to advise the buyer of the contract terms, including the time for commencement and expiry of the cooling-off period, in a timely manner.

Clients can be sometimes difficult to contact. It is suggested that PAMDA (which is specifically designed to promote consumer protection) should provide that a buyer is personally notified of the existence of the properly formed contract before being bound by it.

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<sup>82</sup> For example – Christmas holidays when many law firms close for 1-2 weeks.

Notification need not be via a prescribed form. It is suggested that the process could be simplified by allowing specific telephone conversations (“a relevant telephone conversation”) to be notice of the formation of the contract. A relevant telephone conversation would be one between the buyer and its lawyer. For example, in a relevant telephone conversation the lawyer would notify the buyer that the contract has been received in the correct form. The lawyer would also advise the buyer that the contract is now binding.

It is at that time the cooling-off period should commence. The buyer’s lawyer should then immediately notify the seller or the seller’s lawyer, in writing, that the buyer is bound by the contract. At that time the cooling-off period should be stated so that there is no misunderstanding as to when it begins and ends. This suggested course of action would remove uncertainty as to the commencement and expiry of the cooling-off period, effectively providing better protection for both contracting parties.

The legislation does not contain a definition of “Seller’s Agent”. Often sellers have their lawyers prepare and submit the contract documentation to the buyer.<sup>83</sup> It is suggested that where the lawyer is engaged to prepare the contract then the lawyer should be the appropriate seller’s agent. Note that PAMDA refers to the term “Seller’s Agent” throughout Chapter 11. PAMDA should include a definition of the term “Seller’s Agent”. It is suggested that the definition should include, so far as relates to contract preparation and submission, the seller’s duly appointed real estate agent or the seller’s lawyer.

This inclusion would have the effect of clarifying the agency relationship between the seller and its lawyer. PAMDA uses the term “Seller’s Agent” a number of times in Chapter 11.<sup>84</sup> A statutory definition of this term would avoid uncertainty in interpretation, particularly in relation to the service of notices and the imposition of penalties.

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<sup>83</sup> Information obtained from Johnson Property Lawyers, Broadbeach Waters.

<sup>84</sup> *Property Agents and Motor Dealers Act 2000* (Qld) including ss 365, 366, 366A, 366B, 366C, 366D, 367.

## **7. Submission of “Relevant Contracts” and “Proposed Relevant Contracts”**

Contract submission is the primary source of confusion, not to mention contention, between the parties and their respective representatives.<sup>85</sup> Both sellers and buyers rely on their legal and real estate representatives to take all steps necessary to properly prepare and submit the contract documents. It is therefore important that each of the various methods of contract submission be examined in turn.

### **7.1 Facsimile**

When submitting a relevant contract by facsimile, the legislation requires that the contract documents are transmitted in a specific order. While it is standard practice in the legal and real estate industries to provide a cover sheet with a document being faxed, it is interesting to note that PAMDA requires the cover sheet to be limited to one page only.<sup>86</sup>

That one page cover sheet must include a clear statement directing the attention of the buyer or the buyer's agent to the Warning Statement, the Information Sheet (if the contract is for a unit<sup>87</sup>) and the relevant contract -

**“366 Warning statement if proposed relevant contract is faxed**

- (1) *This section applies if a proposed relevant contract is faxed to a proposed buyer or the proposed buyer's agent for signing, whether or not the proposed relevant contract has been signed by the seller.*
- (2) *If the proposed relevant contract does not relate to a unit sale, the seller or the seller's agent must, when faxing the proposed relevant contract, fax the documents mentioned in paragraphs (a), (b), (c) and (d) in the following order—*
  - (a) *a single cover page that includes a clear statement directing the proposed buyer's attention to the warning statement and the proposed relevant contract;*
  - (b) *the warning statement;*
  - (c) *the proposed relevant contract;*
  - (d) *any other documents.*

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<sup>85</sup> Above n 70.

<sup>86</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 365(2).

<sup>87</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 365(2A)(a).

- (3) *If the proposed relevant contract does relate to a unit sale, the seller or the seller's agent must, when faxing the proposed relevant contract, fax the documents mentioned in paragraphs (a), (b), (c), (d), (e) and (f) in the following order—*
- (a) *a single cover page that includes a clear statement directing the proposed buyer's attention to the warning statement, the information sheet, the proposed relevant contract and, if a disclosure statement has not already been given to the buyer or to the buyer's agent, the disclosure statement;*
  - (b) *the warning statement;*
  - (c) *the information sheet;*
  - (d) *the proposed relevant contract;*
  - (e) *if the disclosure statement has not already been given to the buyer or the buyer's agent, the disclosure statement;*
  - (f) *any other documents.*
- (4) *If subsection (2) or (3) is not complied with—*
- (a) *if the seller faxed the documents—the seller; or*
  - (b) *if the seller's agent faxed the documents—the seller's agent;*
- commits an offence.*  
*Maximum penalty—200 penalty units.*
- (5) *It is a defence to a prosecution for an offence against subsection (4) for the seller or the seller's agent to prove that the seller or the seller's agent gave notice to the proposed buyer or the proposed buyer's agent under section 366C."*

PAMDA does not make it clear why the facsimile cover sheet is restricted to a single page. It is suggested that the restriction on the length of the cover sheet is an attempt to ensure that the Warning Statement does not become "lost" or "buried" in the main bulk of the facsimile transmission. The provisions of PAMDA show a clear intention to make the Warning Statement as prominent as possible when contracts are being submitted. When submitting a contract by facsimile, a cover sheet if restricted to a single page may enhance the transmitter's ability to provide the relevant directions<sup>88</sup> to the buyer. Other information should be transmitted separately to the buyer or the buyer's agent.

## 7.2 Electronic Communication Other Than Facsimile

The 2005 amendments have now specifically recognised the *Electronic Transactions (Queensland) Act 2001* ("the ETA").<sup>89</sup> The effect of this inclusion removes any doubt as to the validity of a relevant contract that is submitted electronically. The ETA<sup>90</sup> also resolves any issues which may arise in relation to compliance with statutory writing requirements.<sup>91</sup>

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<sup>88</sup> *Property Agents and Motor Dealers Act 2000* (Qld) ss 365(2), (2A).

<sup>89</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 364A.

<sup>90</sup> *Electronic Transactions (Queensland) Act 2000* s 11.

<sup>91</sup> *Property Law Act 1974* (Qld) s 59.

PAMDA uses email as an example of an electronic communication –

- \*366A Warning statement if proposed relevant contract is given by electronic communication other than fax**
- (1) *This section applies if a proposed relevant contract is given to a proposed buyer or the proposed buyer's agent by electronic communication, other than fax, for signing, whether or not the proposed relevant contract has been signed by the seller.*
  - (2) *If the proposed relevant contract does not relate to a unit sale, the seller or the seller's agent must ensure that the electronic communication contains—*
    - (a) *a message that includes a clear statement directing the proposed buyer's attention to the warning statement and the proposed relevant contract; and*
    - (b) *a single document, consisting only of the warning statement and the proposed relevant contract, that is protected against unauthorised change, with the warning statement appearing as the first or top page of the document.*
  - (3) *If the proposed relevant contract does relate to a unit sale, the seller or the seller's agent must ensure that the electronic communication contains—*
    - (a) *a message that includes a clear statement directing the proposed buyer's attention to the warning statement, the information sheet, the proposed relevant contract and, if the disclosure statement has not already been given to the buyer or the buyer's agent, the disclosure statement; and*
    - (b) *a single document, consisting only of the warning statement, the information sheet and the proposed relevant contract, that is protected against unauthorised change, with the warning statement appearing as the first or top page of the document and the information sheet appearing immediately after the warning statement.*
  - (4) *Despite subsection (3)(b), the disclosure statement may form part of the single document mentioned in that provision if it does not appear before the information sheet.*
  - (5) *If subsection (2) or (3) is not complied with—*
    - (a) *if the seller gave the electronic communication—the seller; or*
    - (b) *if the seller's agent gave the electronic communication—the seller's agent;**commits an offence.*  
*Maximum penalty—200 penalty units.*
  - (6) *It is a defence to a prosecution for an offence against subsection (5) for the seller or the seller's agent to prove that the seller or the seller's agent gave notice to the proposed buyer or the proposed buyer's agent under section 366C."*

PAMDA provides that electronically submitted contracts are acceptable but only if they comply with the provisions of both PAMDA and the ETA –

**\*364A Relationship with Electronic Transactions (Queensland) Act**

*To remove any doubt, it is declared that the use of electronic communication under this chapter is subject to the Electronic Transactions (Queensland) Act 2001."*

When submitting a contract electronically, the contract must be attached to the electronic communication as a single document.<sup>92</sup> This single document must be protected against unauthorised change.<sup>93</sup> The Warning Statement must appear as the first or top page of the document, with the information sheet (if the property is a unit) and the relevant contract following in that order. Any other documents should be incorporated into the file to follow the contract or sent by a separate communication.

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<sup>92</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 365(2)(b)(ii).

<sup>93</sup> a protected ".pdf" or encrypted file.

The electronic communication to which the relevant contract is attached must contain a message including a clear statement directing the attention of the buyer or the buyer's agent to the Warning Statement, the information sheet (if the property is a unit) and the relevant contract.<sup>94</sup>

In order to properly comply with the provisions of PAMDA and the ETA, the consent of the parties must be obtained before the relevant contract is transmitted. In a practical sense, this requires a separate email or fax to be sent to the buyer or the buyer's agent requesting the buyer's consent to the contract being submitted electronically. Once that consent has been received, only then is it appropriate for the contract to be electronically transmitted to the buyer or the buyer's agent.

It is unclear what the outcome would be if a relevant contract was sent electronically in the correct form but without the prior consent of the recipient as required by s 11 ETA. Both PAMDA and the ETA are silent in this regard. It is suggested that, notwithstanding the lack of consent, the contract should be binding. Research reveals that the courts are yet to find themselves in the position of deciding this particular matter and so it remains to be seen what the ultimate outcome would be.<sup>95</sup>

While PAMDA refers to email as an example of electronic communication, facsimile transmissions are dealt with separately. It is suggested that this distinction causes further confusion for lawyers and real estate agents seeking to ensure compliance with PAMDA and the ETA.

The requirement for consent before electronic communication poses a question – if consent is required before emailing a contract, why is it not required for faxing? The reason for the legislative distinction between email and faxes is unclear. It creates an ambiguity to require a party to consent to a contract being submitted via email when prior consent is not required for contracts submitted in any other manner.

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<sup>94</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 365(2)(b)(i).

<sup>95</sup> Search of Austlii databases 23 April 2008.

It is suggested that PAMDA should be amended to permit contracts to be forwarded by email without the prior consent of the recipient. However, when using email as a means of communication, PAMDA should require the recipient of the email to acknowledge receipt of the contract before it becomes binding. This would alleviate problems caused by email transmissions that go astray or are fire-walled and as a consequence, are not received by the intended recipient. It is suggested that acknowledgement of the transmission would be acceptable if given by return email, facsimile or telephone.

### 7.3 Handed or Otherwise Delivered

In the event that a contract is hand delivered or posted to the buyer or buyer's agent, PAMDA requires the Warning Statement to be attached to the relevant contract and appear as the first or top page. The seller or the seller's agent is also required to direct the attention of the buyer or the buyer's agent to the Warning Statement and the relevant contract –

- “366B Warning statement if proposed relevant contract is given in another way***
- (1) This section applies if a proposed relevant contract is given to a proposed buyer or the proposed buyer's agent for signing in a way other than by electronic communication.*
  - (2) The seller or the seller's agent must ensure that the proposed relevant contract has attached a warning statement and, if the proposed relevant contract relates to a unit sale, an information sheet with the warning statement appearing as its first or top page and any information sheet appearing immediately after the warning statement.*
  - (3) If the proposed relevant contract does not comply with subsection (2)—*
    - (a) if the seller gave the proposed relevant contract—the seller; or*
    - (b) if the seller's agent gave the proposed relevant contract—the seller's agent; commits an offence.**Maximum penalty—200 penalty units.*
  - (4) If the seller or the seller's agent hands the proposed relevant contract to the proposed buyer, the seller or the seller's agent must direct the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.*

*Note—*  
*A contravention of this subsection is not an offence. Under section 366D(3), in the circumstances of this subsection a warning statement is of no effect unless it is signed by the buyer.*
  - (5) Subsection (6) applies if the seller or the seller's agent gives the proposed relevant contract to the proposed buyer or the proposed buyer's agent in a way other than by handing the proposed contract to the proposed buyer or the proposed buyer's agent.*
  - (6) The seller or the seller's agent must include with the proposed relevant contract a statement directing the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.*

*Maximum penalty—200 penalty units.*
  - (7) It is a defence to a prosecution for an offence against subsection (3) or (6) for the seller or the seller's agent to prove that the seller or the seller's agent gave notice to the proposed buyer or the proposed buyer's agent under section 366C.”*

While PAMDA requires faxed relevant contracts to have a single cover page,<sup>96</sup> if a relevant contract is posted to the buyer or buyer's agent, there is no restriction on the length of the accompanying letter containing the appropriate directions to the buyer. Similarly, if relevant a contract is transmitted electronically there is no restriction on the length of the email message to which the file containing the relevant contract is attached.

Other sections of PAMDA<sup>97</sup> contain provisions similar to s365, however these sections relate to submission of proposed relevant contracts rather than relevant contracts. In addition to prescribing the way in which a proposed relevant contract is to be submitted, if the proposed relevant contract is not submitted in a prescribed manner then the seller or the seller's agent (whoever submitted the proposed relevant contract) commits an offence.<sup>98</sup> The maximum penalty for each offence is 200 penalty units. This is equivalent to \$15,000.00.<sup>99</sup>

## 7.4 Errors

An error made in the process of submission of a proposed relevant contract can be corrected, but only if the proposed relevant contract has not been signed -

- "366C Error in process may be corrected before relevant contract is signed***
- (1) *This section applies if, before a proposed relevant contract has been signed by both the seller and the proposed buyer—*
- (a) *the seller or the seller's agent fails to comply with a requirement under this part for the proposed relevant contract; or*
  - (b) *the use of an electronic transaction for the proposed relevant contract does not comply with the Electronic Transactions (Queensland) Act 2001.*
- Note—*  
*See the Electronic Transactions (Queensland) Act 2001, section 11 for a requirement about consent and section 14 for rules about requirements for signatures when using electronic communications.*
- (2) *For the defence mentioned in section 366(5), 366A(6) or 366B(7), the seller or the seller's agent may notify the proposed buyer or the proposed buyer's agent of the failure to comply at any time before the proposed relevant contract has been signed by both the seller and the proposed buyer.*
- (3) *The notice must identify the failure to comply and—*
- (a) *state that the proposed relevant contract is withdrawn; and*
  - (b) *advise whether new documents complying with the requirements of this part will be given to the proposed buyer or the proposed buyer's agent."*

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<sup>96</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 365(2)(a)(i).

<sup>97</sup> *Property Agents and Motor Dealers Act 2000* (Qld) ss 366, 366A, 366B.

<sup>98</sup> *Property Agents and Motor Dealers Act 2000* (Qld) ss 366(4), 366A(5), 366B(3), 366B(6).

<sup>99</sup> *Ibid.*



The Agent must notify the parties of the error and the contract must be re-prepared and submitted properly. This is a small window of opportunity but, it must be noted, once a proposed relevant contract has been fully signed it becomes a relevant contract and any error made in its submission can no longer be rectified.

## 7.5 Warning Statements

A Warning Statement must be attached to the contract as the first or top sheet and must signed by the buyer before the buyer signs the proposed relevant contract -

***“366D Content and effectiveness of warning statements***

- (1) *The warning statement for a proposed relevant contract or relevant contract must include the following information—*
  - (a) *the relevant contract is subject to a cooling-off period;*
  - (b) *when the cooling-off period starts and ends;*
  - (c) *a recommendation that the buyer or proposed buyer seek independent legal advice about the proposed relevant contract or relevant contract before the cooling-off period ends;*
  - (d) *what will happen if the buyer terminates the relevant contract before the cooling-off period ends;*
  - (e) *the amount or the percentage of the purchase price that will not be refunded from the deposit if the relevant contract is terminated before the cooling-off period ends;*
  - (f) *a recommendation that the buyer or proposed buyer seek an independent valuation of the property before the cooling-off period ends;*
  - (g) *if the seller under the proposed relevant contract or relevant contract is a property developer, that a person who suffers financial loss because of, or arising out of, the person's dealings with a property developer or the property developer's employees can not make a claim against the claim fund.*
- (2) *A statement purporting to be a warning statement is of no effect unless the words on the statement are presented in substantially the same way as the words are presented on the approved form.*

*Example—*

*If words on the approved form are presented in 14 point font, the words on the warning statement must also be presented in 14 point font.*
- (3) *If the seller or the seller's agent hands a proposed relevant contract to the buyer for signing, a warning statement is of no effect unless the buyer signs the warning statement before signing the proposed relevant contract.*
- (4) *If a proposed relevant contract is given to the buyer for signing and subsection (3) does not apply, a warning statement is of no effect unless the buyer signs the warning statement.*
- (5) *For subsection (3), the buyer's signature on the warning statement is taken to be proof that the buyer signed the warning statement before signing the proposed relevant contract unless the contrary is proved.”*

If this requirement is not fulfilled the warning statement has no effect. Note that s366D(2) requires the warning statement to be presented in “*substantially the same way*” as the approved form.<sup>100</sup> As can be seen from the extract above, this requirement extends even to the font used on the statement.

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<sup>100</sup> Form 30c Warning Statement, refer to Appendix E.

If the requirements of s366D are not complied with in all respects, the warning statement has no effect. The result is that the buyer is not bound by the contract. As a consequence, the buyer may elect to terminate the contract at any time before settlement.<sup>101</sup> In order to terminate the contract, the buyer must give a signed and dated notice of termination to the seller.<sup>102</sup>

The detailed requirements of the warning statement, coupled with the buyer's resulting right of termination, reinforces the highly technical nature of PAMDA. If the buyer intends to avoid the contract by relying on s366D then the onus is on them to prove that either -

- i. the warning statement was not presented using the correct form; or
- ii. the warning statement was signed by the buyer after execution of the contract.

This requirement reinforces the well established legal maxim of *"he who asserts must prove"*.<sup>103</sup>

If the buyer elects to terminate the contract for non-compliance with s366D, then the seller and the person acting for the seller who prepared the contract are jointly and severally liable to the buyer to reimburse the buyer for its reasonable legal and other expenses incurred after execution of the contract.<sup>104</sup>

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<sup>101</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 367(2).

<sup>102</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 367(2).

<sup>103</sup> *Royal Bank of Scotland v Etridge* [2001] UKHL 44, 13.

<sup>104</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 367(6),(7).

## PART 3 - CASE LAW

### 8. *Recent Decisions*

A significant body of case law relevant to the application of PAMDA has been compiled since 2001. In particular, there are a few recent decisions, discussed below, which are relevant particularly to the application of Chapter 11.

#### 8.1 **MNM Developments Pty Ltd v Gerrard**<sup>105</sup>

*MNM Developments Pty Ltd v. Gerrard* [2005] (“MNM Developments”) was originally heard in the Queensland District Court where the buyer had applied for summary judgment. At first instance, the court found that the buyer was bound by the contract. The buyer appealed and the case was subsequently heard by the Court of Appeal.

This case is significant because there had been no previous occasion for the court to properly examine the issue of whether a Form 30C Warning Statement was “attached” to a contract pursuant to PAMDA.

##### Facts of the Case

A contract for residential property on the Gold Coast was signed by the respondent (Gerrard) and appellant (MNM) and dated 10 June 2003. The purchase price was \$1,250,000.00 with settlement to be effected on 4 June 2004. Because the property was residential and not sold at auction, PAMDA applied.

The appellant purported to terminate the contract on 24 May 2004 by giving notice of termination to the respondent. The notice was issued pursuant to s367 of PAMDA and stated that s366 had not been complied with.

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<sup>105</sup> [2005] QCA 230.

The appellant submitted that the respondent had failed to “attach” to the contract “as its first or top sheet” a “warning statement”<sup>106</sup>. The respondent rejected the appellant’s termination of the contract.

The appellant alleged that the circumstances surrounding the parties’ entry into the contract were –

- 26 May 2003 – the respondent’s agent sent the appellant one continuous facsimile transmission containing (in the order stated) –
  - Cover sheet/letter
  - Form 27B (as it then was)
  - Form 30C Warning Statement
  - Proposed contract (standard REIQ form)
- 26 May 2003 - the director of the appellant signed documents in the order received and faxed them back to the agent
- 10 June 2003 – the appellant received the signed Form 27B, signed Form 30C Warning Statement and original contract for signing.
- 10 June 2003 - the contract was signed and dated by the appellant.

Originally, the appellant sought a Declaration in the District Court that it had validly terminated the contract. The appellant also sought an Order for repayment of the deposit in the sum of \$62,500.00.

### The Decision

The application was dismissed. Newton, DCJ concluded that the Warning Statement had been attached to the contract as required by s366(1).<sup>107</sup> The appellant was granted leave to appeal

*“because the construction of the statutory provision has not yet been settled at appellant level, and the determination of this case may have a significant impact on contracts for the sale of residential property...”*<sup>108</sup>

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<sup>106</sup> De Jersey CJ at paragraph [1].

<sup>107</sup> Extract of s366(1) of PAMDA, which was in effect at the time the contract was entered into:

***“366 warning statement to be attached to relevant contract”***

*(1) A relevant contract must have attached, as its first or top sheet, a statement in the approved form (“warning statement”) containing the information contained in Subsection (3).*

<sup>108</sup> de Jersey CJ at [3].

The Macquarie and Shorter Oxford English Dictionaries were referred to for the correct definition of “attached”. The dictionaries consulted indicated that there must be some physical joinder or incorporation and not merely an association with or close proximity to the other documents.<sup>109</sup>

When interpreting the meaning of “attached” in PAMDA, it has previously been held that a narrow interpretation should be favoured.<sup>110</sup> Some form of physical joinder or incorporation is necessary to ensure that the provisions of PAMDA are complied with. However, in this instance, de Jersey CJ found that the Warning Statement was “attached” to the contract.<sup>111</sup>

In obiter, de Jersey CJ made reference to the preamble to PAMDA, particularly the Object “*to protect consumers against particular undesirable practices*”.<sup>112</sup> He extended the protection of that Object to “*...giving a purchaser a right to terminate even for quite technical contraventions...*”.<sup>113</sup> While the appeal ultimately failed because the Warning Statement was not the first or top sheet, the impact of this case was significant enough to assist in prompting a review and amendment of PAMDA.

This case highlighted a significant deficiency in the legislation. Prior to the 2005 amendments, in order to comply with the strict interpretation of the word “attached”, parties submitting proposed or executed contracts were technically prohibited from using normal commercial methods of communication such as facsimile or email. This restriction is commercially unrealistic in modern business practice. As a result, the 2005 amendments were drafted to include a definition of “attached”.<sup>114</sup> Also, there are now specific references in PAMDA to the faxing or electronic transmission of proposed and relevant contracts.

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<sup>109</sup> de Jersey CJ at [13].

<sup>110</sup> *M P Management (Aust) Pty Ltd v Churven & Anor* [2002] QSC 320 at [21].

<sup>111</sup> de Jersey CJ at [19].

<sup>112</sup> de Jersey CJ at [16].

<sup>113</sup> de Jersey CJ at [16].

<sup>114</sup> *Property Agents and Motor Dealers Act 2000* Qld s364.

“attached in relation to a warning statement, any information sheet and a contract, means attached in a secure way so that the warning statement, any information sheet and the contract appear to be a single document. *Examples of ways a warning statement and any information sheet may be attached to a contract - stapling, binding.*”

## 8.2 Grieve & Anor v Enge & Anor<sup>115</sup>

The case of *Grieve v Enge* [2006] (“Grieve”) was heard by a single Justice of the Supreme Court of Queensland. This case is significant because it dealt with the purported “cooling off” of a seller of residential property.

### Facts of the Case

An REIQ contract was signed by the plaintiff buyer (Grieve) on 13 July 2002. The contract was countersigned by the defendant seller (Enge) on 15 July 2002. The contract contained a condition for finance. This condition was due on 29 July 2002.

On the facts, it is unclear when the plaintiff received its copy of the fully signed contract. In the defendant’s pleadings, it was alleged that the real estate agent had represented to him that he had a cooling off period which would permit him to “cool off” or withdraw from the contract within five days after executing it.<sup>116</sup>

The defendant submitted that s365 of PAMDA affects not only the buyer’s common law position so far as being bound by a contract relates, but also the seller’s. It was argued that s365(1) of PAMDA should be read to allow a seller to withdraw from a contract at any time prior to the buyer being bound by that contract. This would have the effect of allowing a seller to withdraw from a contract in the event that s365 of PAMDA was not complied with.

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<sup>115</sup> [2006] QSC 37.

<sup>116</sup> Callinane J at paragraph [15].

### The Decision

Callinane J found that outcome "*would seem a somewhat odd result*".<sup>117</sup> In my view, if this argument were to be accepted, this would place buyers in a particularly perilous situation as it is usually the case that the seller or the seller's agent is responsible for preparation and submission of the contract.

His Honour concluded that s365(1) should not be read to give a seller the ability to withdraw from a contract and further that it was not the intent of the legislation to alter the common law position as stated in *Rymark's*<sup>118</sup> case so far as the seller is concerned.<sup>119</sup>

The court ultimately found that the seller was bound by the contract. The case was later heard by the Supreme Court of Queensland Court of Appeal<sup>120</sup> however, the issue of the purported seller's cooling off period was not examined in that instance. As a result, it is not necessary to examine the appeal case.

### The Potential for Disaster

The case of *Grieve* succinctly determined the issue of whether a seller is entitled to the benefit of a cooling off period. This case also reinforced the view that the intent of Chapter 11 of PAMDA is to protect a buyer, not a seller, of residential property.

On examination of both the legislation and *Grieve's* case, it is suggested that if the legislation allowed the seller a cooling off period and also entitled the seller to rely on the provisions of s365 of PAMDA, then this would in practice have the effect of placing both the seller and the buyer in a commercially unviable, unworkable and unrealistic situation.

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<sup>117</sup> at paragraph [39].

<sup>118</sup> *Rymark Australia Development Consultants Pty Ltd v Draper* [1977] QdR 336 - "the Supreme Court of Queensland held that when a vendor had signed a contract to sell land and notified the purchaser that the contract had been signed, a binding contract came into existence".

<sup>119</sup> at paragraph [41].

<sup>120</sup> on 24 May 2006 before de Jersey CJ, McMurdo P and Helman J.

To allow the seller to terminate a contract relying on the provisions of s365 of PAMDA would place a significant burden on the contracting parties and would likely result in confusion and uncertainty as to when, and indeed if, the parties are bound by the contract.

In practice, this would mean that potentially a seller could, one way or another, ensure that s365 is not complied with, effectively giving themselves a mechanism for escaping the confines of an undesirable contract or, alternatively, being able to assume the benefit of that contract whilst also taking advantage of the current property market fluctuations.

To give an example of my proposition in the above paragraph, consider the following –

*If the seller ("S") lists Blackacre for sale and a potential buyer ("B1") notifies its interest in Blackacre to S, then potentially S or S's agent could prepare and submit contract documents for execution by B1.*

*If B1 signs and returns the contract documents to S and S executes these documents and communicates acceptance of B1's offer, then under normal contractual principles<sup>121</sup> a contract would be formed.*

*However, if S or S's agent did not comply with s365 of PAMDA, then neither S nor B1 would be bound under the contract. This would entitle either party to terminate or withdraw its offer to purchase/sell.*

*As there is no binding contract, S would have the advantage of being able to continue to market Blackacre and, in the event that the property market was on the rise, S would be entitled to enter into another contract for the sale of Blackacre with a secondary Buyer ("B2").*

*Upon receiving an offer from B2, S would be entitled to withdraw its offer to sell the property to B1.*

If the above example was accepted, and S was allowed the benefit of s365 of PAMDA, then the purpose of the legislation, which is to regulate for the protection of consumers, would be defeated.

### **8.3 Blackman v Milne<sup>122</sup>**

In the case of *Blackman v Milne* [2006] ("Blackman") the Supreme Court of Queensland examined the application of s365<sup>123</sup> of PAMDA, the effect of non-compliance with that section and the proposition that a buyer can waive, by conduct, the seller's non-compliance.

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<sup>121</sup> *Rymark Australia Development Consultants Pty Ltd v Draper* [1977] QdR 336.

<sup>122</sup> [2006] QSC 350 (23 November 2006).

<sup>123</sup> "When parties are bound under a relevant contract".



### Facts of the Case

A contract was signed by the applicants (Blackman) on 4 October 2006 for their purchase of residential property at Mansfield ("the Mansfield contract") from the respondent (Milne). The Mansfield contract was subject to a special condition under which the buyer must enter into an unconditional contract for the sale of its property and complete settlement of the sale of that property within 60 days from the date of the Mansfield contract. When the contract was prepared the applicants were not provided with the required warning directing the buyer's attention to the Warning Statement and contract documents.

The Mansfield contract provided that the buyer had the option to waive the application of the special condition. The Mansfield contract also contained a "sunset clause" under which the seller was entitled to source alternative offers for the sale of the property. Shortly after entering into the contract, an alternative offer for the property was received by the respondents. When advising the applicants of the alternative offer, the real estate agent failed to provide a copy of that offer to them as was required by the sunset clause.

The sunset clause allowed the applicants to elect whether they wished to proceed with the contract. If they did elect to proceed, the applicants were required to declare the contract unconditional within a certain period of time. Because the agent had failed to properly notify the applicants of the alternative offer, there was some confusion as to the deadline for notification by the applicants of their intentions. The applicants did elect to proceed and subsequently purported to declare the contract unconditional. In the meantime, the respondents purported to terminate the contract.

The issues to be decided by the Court were –

1. whether a binding contract was actually entered into; and

2. whether the applicants had validly elected to forego the benefit of a special condition contained in it.<sup>124</sup>

Only the first issue mentioned above will be discussed.

#### Was a Binding Contract Entered Into?

It was accepted on the facts that the agent did not at any time direct the attention of the buyer to the Form 30c Warning Statement. Although the contract that was forwarded to the buyer contained the Form 30c, the covering correspondence from the agent did not direct the buyer's attention to it. It was also accepted that neither of the respondents directed the applicants' attention to the Form 30c.

Douglas J stated that the issue to be decided was

*"...whether the statutory provision here creates a private right merely for the private benefit of an individual such as the plaintiff, or is a provision reflecting a public policy for the benefit of the community."*<sup>125</sup>

Chapter 11 of PAMDA focuses on the rights of the buyer. In Blackman's case, the operation of s365(2)(c)(ii) focuses on the statutory requirement of the seller or the seller's agent to direct the attention of the buyer to the Warning Statement and the relevant contract.

His Honour also made a comment similar to that made by Cullinane J in *Grieve v Enge*<sup>126</sup> stating that

*"It would be anomalous, in my view, if sellers could keep themselves from being bound to a contract by relying on their own admissions to comply with statutory provisions..."*<sup>127</sup>

In looking at the private v public policy issue, His Honour also examined the provisions of ss369 - 370 of PAMDA which deal respectively with the waiver and shortening of the cooling off period. Counsel for the respondent argued that a buyer was not entitled to waive a breach of the requirements of s365 of PAMDA either expressly or impliedly by its conduct.

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<sup>124</sup> Douglas J at paragraph [1].

<sup>125</sup> at paragraph [15].

<sup>126</sup> *Grieve v Enge* 2006 QSC 37.

<sup>127</sup> Douglas J at paragraph [19].

### The Decision

His Honour found that s369 and s370 of PAMDA focus on ensuring that if the buyer wishes to shorten or waive the cooling off period then it does so after having received legal advice necessary for it to make a fully informed decision.

It was held that the obligations imposed by PAMDA to direct the buyer's attention to the Warning Statement was a statutory right created for the private benefit of the buyer and could therefore be waived by the buyer.

The court found that the applicants had waived the respondent's breach of s365 of PAMDA by purporting to declare the contract unconditional when the alternative offer was received by the respondent. This had the effect of affirming the contract, despite the clear breach of the legislation by the seller.

### Practical Implications of the Decision

If left unchallenged, His Honour's decision would have had a serious effect on the application of s365 of PAMDA, particularly s365(3), which clearly states that "*...the buyer may withdraw the offer at any time before being bound by the relevant contract...*". The decision is contrary to the literal interpretation of PAMDA and its intended application.

The decision appears to have raised more questions than it answered. For example, "at what point in the conveyance is the buyer deemed to have waived its rights in respect of the seller's non-compliance with PAMDA?" Blackman's case examined only the non-compliance with s365 of PAMDA. It could be argued that the decision of Douglas J, if applied to s366 of PAMDA, would have the effect of negating the penalty provisions specifically provided in the Act.

When examining the judgment closely it appears that the decision was perhaps made without giving full consideration to its implications in a broader sense. Non-compliance with s366 of PAMDA is intended to be considered a serious matter, hence the burdensome penalty imposed for each offence.

#### Where to Now?

A search of the Queensland Courts Registry reveals no intention to Appeal the decision.<sup>128</sup> This decision resulted in uncertainty in conveyancing practice as to when during the conveyancing process the buyer's right to withdraw from a contract pursuant to s365 or s366 of PAMDA is protected.

Applying s14A(1) of the *Acts Interpretation Act 1954*,<sup>129</sup> it can be said that s365 and s366 of PAMDA should be interpreted narrowly to protect the buyer at all times from the Seller's non-compliance. This narrow interpretation will best achieve the purpose of the Act, which is that of consumer protection.

Whilst it is acknowledged that Blackman is a more recent authority, the contrasting decision in the 2002 case of *M P Management (Aust) Pty Ltd v Churven & Anor*<sup>130</sup> should be noted. That case also addressed the issue of whether the buyer could waive the right afforded to it by s367(2) of PAMDA and Muir J concluded<sup>131</sup> that

*"...there is no inconsistency between acknowledging the existence of the contract and taking a step under or on reliance on it on the one hand and the maintenance of the right to terminate conferred by s367(2), on the other. That provision gives the Buyer the right to terminate "the contract at any time before the contract settles", irrespective of the nature and extent of the performance under the contract and irrespective of the parties conduct by reference to it. Consequently, failure to exercise the right of termination of a contract, even with full knowledge of the right to terminate, is not necessarily inconsistent with Acts which acknowledge the continued existence of the contract."*

*M P Management (Aust) Pty Ltd v Churven & Anor*<sup>132</sup> was followed in 2003 by Wilson SC DCJ in *Sugiyama Corporation v Boland & Anor*.<sup>133</sup> It is uncertain why, with established authority on this very point, Douglas J found the need to go against the previous decisions of his learned colleagues.

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<sup>128</sup> <http://www.ecourts.courts.qld.gov.au/eSearching/filedetails.asp?FileNumber=9439%2F06&Court=Supreme&Location=BRISB2F> on 22 February 2008.

<sup>129</sup> *Acts Interpretation Act 1954* (Qld), s 14A(1) – In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

<sup>130</sup> [2002] QSC 320.

<sup>131</sup> At [46].

<sup>132</sup> [2002] QSC 320.

## 8.4 Juniper v Roberts<sup>134</sup>

After the unsettling decision in *Blackman v Milne*<sup>135</sup> the recent Supreme Court decision of Douglas J in *Juniper v Roberts* ("Juniper") restates the strength of buyer's position when faced with the seller's non-compliance with Chapter 11.

### Facts of the Case

The applicant agreed to purchase the respondent's property in May 2004. The applicant purported to terminate the contract of sale shortly before settlement.

The basis for the applicant's termination was the respondent's failure to comply with s366<sup>136</sup> of PAMDA. The applicant alleged that the respondent had breached s366 by failing to attach the Warning Statement to the contract. At the time the contract was entered into s366 stated that if the Warning Statement was not attached to the contract as its top or first sheet then a buyer was entitled to terminate the contract at any time before the contract settles.

The contract had been faxed to the applicant for signature by the seller's real estate agent. There were a number of draft contracts prepared by the agent and faxed to the applicant throughout the negotiation phase of the purchase. Each fax had a cover sheet followed by a Warning Statement. The contract special conditions were apparently forwarded by fax separate from the contract and without a cover sheet or Warning Statement.

The contract that was eventually signed by the applicant was compiled by him from the various faxes received from the agent. The applicant signed the contract and faxed it back to the agent. The respondent signed the faxed contract bearing the applicant's signature and the completed contract was then forwarded, once again by fax, to the applicant's lawyer.

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<sup>133</sup> [2003] QDC 426.

<sup>134</sup> [2007] QSC 379 (6 December 2007).

<sup>135</sup> [2006] QSC 350 (23 November 2006).

<sup>136</sup> As it was then.

Was the Warning Statement attached to the contract?

His Honour examined the circumstances surrounding the submission and execution of the contract and determined that because the contract was not sent as one continuous facsimile the Warning Statement was not attached to the contract as required by PAMDA.

The Decision

Having determined that a breach of PAMDA existed, His Honour then turned his mind to validity of the purported termination of the contract. The respondents argued that the applicant had waived his right to terminate the contract by part-performance of the contract.

His Honour distinguished *Blackman v Milne*<sup>137</sup> finding that it was

*"...a long step to take from that conclusion to one preventing a buyer relying on his statutory rights...when he has not waived the sellers' breach nor made any representation that he would not rely upon his statutory rights."*

Further, His Honour found that the earlier part-performance of the contract by the applicant was not a waiver of his statutory right to terminate the contract at a later date.

The Effect

Juniper has reinforced the intention of PAMDA to allow buyers the opportunity to avoid a contract at any time prior to completion where the seller has failed to comply with the relevant statutory requirements. The practical effect of Juniper is to reinforce the view that a literal interpretation of PAMDA should be adopted. The legislation quite clearly states that a right of termination exists. S367(2) allows the buyer to terminate the contract at any time before the contract settles if the Warning Statement is not given or is not effective. Similarly, s365(3) affords the buyer the right to withdraw the offer to purchase at any time before being bound by the contract.

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<sup>137</sup> [2006] QSC 350 (23 November 2006).

Juniper reinforces the previous position that, in the absence of any express representation of waiver by the buyer, part-performance by the buyer has no impact on the buyer's statutory rights to terminate or withdraw from the contract where there has been non-compliance by the seller.

## **8.5 Mark Bain Constructions Pty Ltd v Tim Barling & Ors<sup>138</sup>**

In the case of *Mark Bain Constructions Pty Ltd v Tim Barling & Ors* ("Mark Bain") the Supreme Court of Queensland examined the effect of PAMDA so far as it relates to Put and Call Options over residential property.

### Facts of the Case

Put and Call Options were entered into in relation to two proposed residential properties between the applicant (Mark Bain) as "Grantor" and the respondents (Barling & Ors) as "Grantees". The Option Deeds were dated 25 February 2003.

The respondents purported to terminate the Option Deeds pursuant to s367 of PAMDA stating non-compliance with s366(1) as the grounds for termination. The applicant rejected the respondents' purported termination.

In view of the requirements of s366 and the rights afforded by s367, Philippides J was required to determine whether the Option Deeds were "relevant contracts" as defined in s364 of PAMDA.<sup>139</sup>

### Where the Option Deeds "Relevant Contracts"?

The respondents contended that the Option Deeds were "relevant contracts" for the purposes of PAMDA and a Warning Statement was required to be attached to each Deed as its first or top sheet. The applicant refuted this contention and submitted that PAMDA required a Warning Statement to be attached to the contract when that document was executed pursuant to the exercise of the Options.

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<sup>138</sup> [2006] QSC 048.

<sup>139</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* as amended by amendments up to Act 78 of 2002, as contained in Reprint No. 1J (Revised Edition). In s364 "relevant contract" means a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction.

Although Chapter 11 was extensively amended by the 2005 amendments, s366 of PAMDA at the time the Option Deeds were executed<sup>140</sup> provided that the Warning Statement must be in the approved form and that it must be attached to the contract as the first or top sheet. The buyer had the right to terminate the contract “at any time before the contract settles” if the Warning Statement is not attached correctly.<sup>141</sup>

Philippides J referred to the comments of de Jersey CJ in *MNM Developments Pty Ltd v Gerrard*<sup>142</sup> and Williams JA<sup>143</sup> that PAMDA’s intention could be interpreted to extend to include documents that were presented to a potential buyer for execution.

If these documents would result in a relevant contract coming into existence, then they must have attached as the first or top sheet a prescribed Warning Statement. Her Honour also referred to previous cases which had held that Options were conditional contracts to sell.<sup>144</sup>

### The Decision

The Court found that the definition of “relevant contract” contained in s364 of PAMDA should be interpreted to include Option Deeds. Philippides J, concluded that the Option Deeds were each a “contract for the sale of land” and as such each Option Deed was a “relevant contract” for the purpose of the then s366 of PAMDA. Due to the applicant’s failure to comply with the provisions of PAMDA, it was held that the respondents were entitled to terminate the Option Deeds.

### The Effect

Since the decision in Mark Bain, conveyancing practice has been significantly altered. Practitioners must now be careful to follow the requirements contained in PAMDA relating to the attachment of a

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<sup>140</sup> 25 February 2003.

<sup>141</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s 367.

<sup>142</sup> [2005] QCA 230 at [6].

<sup>143</sup> *ibid* at [29].

<sup>144</sup> *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd* [2005] QCA 270. Keane JA at [22], *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at [76].



Warning Statement to Options and the accompanying directions that must be given to potential buyers directing their attention to that Warning Statement.

For proposed sellers ("sellers") signing Options, the potential consequences of a failure to comply with PAMDA are nothing short of catastrophic. Firstly, by its very nature, an Option is designed to delay the proposed buyer's ("buyer") commitment to the property until some time in the future. This could be a matter of weeks, months or even years. During the Option period, the seller is effectively unable to deal with the property. The seller cannot list the property for sale, market it or take advantage of peaks in the real estate market.

Whilst it is acknowledged that the nature of certain Options are such that it is the sole option of the buyer to exercise their right to buy, Put and Call Options are designed specifically to ensure some manner of certainty to the transaction, from the seller's perspective. If PAMDA is not complied with the seller is left in a position of flux, dangling at the whim of the buyer.

Of course, if the buyer elects to proceed with the transaction, the seller is safe. But, if the buyer is aware that PAMDA has not been complied with, and a Put and Call Option has been signed, the seller has no way to enforce the terms of the Option and force the buyer to perform.

The ultimate position is that the seller's only remedy (for the loss of the sale of its property) is to invoke the statutory penalty provisions<sup>145</sup> against the party who prepared and submitted the Option Deed to the buyer.

## **PART 4 - NON-COMPLIANCE**

### ***9. The Effect of Non-Compliance with Chapter 11***

If the seller fails to comply with the requirements of Chapter 11, then the buyer may withdraw the offer to purchase the property or terminate the contract. The buyer's right to withdraw the offer to

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<sup>145</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* – ss 366(4), 366A(5), 366B(3), 366B(6).

purchase or to terminate the contract is not restricted by any apparent part-performance of the contract on the buyer's part -

- \*367 Buyer's rights if a warning statement is not given or is not effective**
- (1) *This section applies if—*
- (a) *a warning statement requirement for a proposed relevant contract is not complied with and notice is not given under section 366C; or*
- (b) *a warning statement is of no effect under section 366D(2), (3) or (4).*
- (2) *The buyer under a relevant contract may terminate the relevant contract at any time before the relevant contract settles by giving signed, dated notice of termination to the seller or the seller's agent.*
- (3) *The notice of termination must state that the relevant contract is terminated under this section.*
- (4) *If the relevant contract is terminated, the seller must, within 14 days after the termination, refund any deposit paid under the relevant contract to the buyer.*  
*Maximum penalty—200 penalty units.*
- (5) *If the seller, acting under subsection (4), instructs a licensee acting for the seller to refund the deposit paid under the relevant contract to the buyer, the licensee must immediately refund the deposit to the buyer.*  
*Maximum penalty—200 penalty units.*
- (6) *If the relevant contract is terminated, the seller and the person acting for the seller who prepared the relevant contract are liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the relevant contract after the buyer signed the relevant contract.*
- (7) *If more than 1 person is liable to reimburse the buyer, the liability of the persons is joint and several.*
- (8) *An amount payable to the buyer under this section is recoverable as a debt.*
- (9) *In this section—*  
***warning statement requirement***, for a proposed relevant contract, means—
- (a) *if the proposed relevant contract is sent by fax—a requirement to comply with section 366(2) or (3); or*
- (b) *if the proposed relevant contract is given by electronic communication other than fax—a requirement to comply with section 366A(2) or (3); or*
- (c) *if the proposed relevant contract is given in a way other than by electronic communication—a requirement to comply with section 366B(2), (4) or (6)."*

PAMDA is clear in allowing the buyer to withdraw its offer to purchase,<sup>146</sup> however there has been some discussion within the legal industry<sup>147</sup> that the seller may be also able to avoid a contract if PAMDA is not complied with.

This proposition stems from s365(1) of PAMDA which provides that *"...the buyer and the seller..."* under a relevant contract are bound when the contract is submitted in the manner prescribed by s365(2) or (2A). It has been suggested<sup>148</sup> that this would have the effect of allowing a seller to rely on its own breach in order to gain a commercial advantage, i.e. avoiding an undesirable contract. If s365(1) of PAMDA is interpreted to allow a seller to avoid the contract then, it is suggested, the effect of this interpretation would be contrary to the consumer protection intention of the legislation.

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<sup>146</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 365(3).

<sup>147</sup> Issue discussed by delegates at LexisNexis Conveyancing Masterclass May 2006.

<sup>148</sup> Issue discussed by delegates at LexisNexis Conveyancing Masterclass May 2006.

It is arguably illogical to allow a seller the right to withdraw from a contract for their own failure to comply with PAMDA. Section 365 of PAMDA is the legislative trigger for the cooling-off period which commences when the buyer is bound by the contract. The buyer is the only party to the contract who is entitled to “cool off” and then terminate within that period. The seller is not permitted this remedy.

It is suggested that the intention of the legislation is to protect buyers of residential property, not to provide a seller with the ability to gain a potential commercial advantage by withdrawing from an undesirable contract purely because of its own non-compliance with PAMDA.

PAMDA provides the buyer with two remedies if the seller fails to comply with the provisions of Chapter 11 -

- i. Terminate the contract;<sup>149</sup> and
- ii. Recover from the seller, as a debt, the buyer's reasonable costs incurred by the buyer after it signed the contract.<sup>150</sup>

*Juniper v Roberts*<sup>151</sup> clarified the issue of whether the buyer had, by partly performing the contract, waived the right to terminate a contract where the seller had failed to comply with PAMDA. As stated by s367(2) of PAMDA (and supported by *Juniper v Roberts*<sup>152</sup>) the buyer has the right to terminate or withdraw from a relevant contract at any time before the contract settles or the buyer becomes bound by the contract, notwithstanding any evidence of part-performance.

It is suggested that the costs recoverable by the buyer would include -

- i. Legal fees;
- ii. Building and pest inspection fees;
- iii. Property search fees;

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<sup>149</sup> *Property Agents and Motor Dealers Act 2000* (Qld) – s 367(2).

<sup>150</sup> *Property Agents and Motor Dealers Act 2000* (Qld) – ss 367(6), 367(8).

<sup>151</sup> [2007] QSC 379 (6 December 2007).

<sup>152</sup> [2007] QSC 379 (6 December 2007).

- iv. Valuation fees; and
- v. Bank application fees.

The buyer's costs could reasonably be expected to exceed a few thousand dollars.<sup>153</sup> Note that the legislators, when drafting this provision, considered the damage suffered by the buyer in the case of non-compliance by the seller. Because consumer protection is the primary aim of the legislation, PAMDA makes provision for buyers to be protected against loss suffered through no fault of their own.

If the seller fails to comply with PAMDA, not only is it liable for the buyer's costs but the seller, or its agent, is deemed to have committed an offence.<sup>154</sup> If the seller's agent is not aware of the provisions of PAMDA or fails to comply with those provisions then statutory penalties could be imposed against that person if buyer elects to terminate the contract.<sup>155</sup> Any mistake could prove costly with 200 penalty units (an amount equivalent to \$15,000.00<sup>156</sup>) being the maximum penalty.

Agents expose themselves to statutory penalties for failing to comply with the requirements of PAMDA and there is evidence of frequent failure to comply.<sup>157</sup> Non-compliance extends to the agent failing to draw the proposed buyer's attention to the Warning Statement. It is suggested that for agents, the consequences of not complying with PAMDA are two-fold –

- i. firstly, the agent loses the sale and, consequently, the commission that would have been generated by that sale; and
- ii. secondly, the agent is liable to a Statutory penalty for each offence committed under PAMDA to a maximum of 200 penalty units, or \$15,000.00,<sup>158</sup> for each offence.

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<sup>153</sup> Information on costs associated with property purchases obtained from Johnson Property Lawyers, 23 April 2008.

<sup>154</sup> *Property Agents and Motor Dealers Act 2000* (Qld) – ss 366(4), 366A(5), 366B(3), 366B(6).

<sup>155</sup> *Property Agents and Motor Dealers Act 2000* (Qld) – ss 366(4), 366A(5), 366B(3), 366B(6).

<sup>156</sup> *Penalties and Sentences Act 1992* (Qld) – s 5.

<sup>157</sup> As principal of, and subsequently as consultant to, Johnson Property Lawyers, the writer has observed many instances of non-compliance with PAMDA, including instances as recent as the time of writing this thesis.

<sup>158</sup> *Penalties and Sentences Act 1992* (Qld) – s 5.

Notwithstanding the above consequences, as previously mentioned, the agent has one chance to rectify any error in compliance with PAMDA but only if it is rectified before the proposed contract is signed by both parties.<sup>159</sup> Rectifying the mistake as allowed by s 366C of PAMDA is the agent's only chance to redeem itself and avoid a penalty.

It must be remembered that Chapter 11 deals not only with issues surrounding the contract but also the independence of the lawyer. A lawyer's failure to comply with Chapter 11, and more particularly with s365B of PAMDA, can result disciplinary action being brought by the Queensland Commercial and Consumer Tribunal or the Legal Services Commissioner.

While litigation is rare, there are two noteworthy cases dealing with alleged contraventions of s365B of PAMDA. *The Chief Executive, DTFTWID v Dickie, D.W.*<sup>160</sup> was an action brought against Gold Coast Lawyer, Mr Don Dickie. The matter was heard by the Queensland Commercial and Consumer Tribunal. The Application alleged that Mr Dickie had failed to comply with s365B of PAMDA by not disclosing to clients a business relationship with a referring real estate agent.

It is important to note that while the relevant Form 32a Lawyer's Certificate was provided to clients, it was alleged that the section of that form requiring disclosure from the lawyer as to his independence was incorrectly completed.

The facts of the case indicated that Mr Dickie had, on each occasion a contract was referred to him from a particular real estate agency, stated in the Form 32a that there was no business or other relationship with the agency. The Chief Executive claimed that the sheer number of referrals by the agency to Mr Dickie constituted a business relationship and as such, compromised Mr Dickie's ability to act independently for his clients. Mr Dickie argued that he received no benefit from the agent. The referrals were gratuitous and as such could not constitute a business relationship.

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<sup>159</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* – s 366C.

<sup>160</sup> [2007] QCCTPAMD 42 (24 August 2007).

The Tribunal's decision, handed down by Mr RV Hanson QC, agreed with Mr Dickie's assertions and stated that a gratuitous referral by an agent to a lawyer which the client was "...free to accept or reject"<sup>161</sup> did not constitute a business relationship.

Mention was made by the Tribunal that the purpose of PAMDA and more particularly Chapter 11 is –

*"to enhance consumer protection for buyers...by ensuring...the independence of lawyers acting for buyers."*<sup>162</sup>

It cannot be overlooked that one of the primary reasons behind the enactment of PAMDA was to put an end to the unethical marketing practices employed in the Queensland real estate.<sup>163</sup> These practices sometimes included undisclosed relationships between developers, agents and lawyers who were engaged to represent unwary.<sup>164</sup> While Mr Dickie emerged unscathed from the Tribunal, this case highlights the importance of disclosing any relationships which could compromise the lawyer's ability to act independently for the client.

In *Legal Services Commission v McClelland*,<sup>165</sup> an action brought by the Legal Services Commission, it was claimed that Mr McClelland had engaged in the sharing of receipts with an unqualified person and had failed to provide buyers with the requisite Form 32a Lawyer's Certificate.

The Tribunal's decision, of de Jersey CJ, found that Mr McClelland's breach of s365B of PAMDA in failing to provide a Lawyer's Certificate amounted to unprofessional conduct. Mr McClelland's practicing certificate was suspended for a period of four months due to the combination of the sharing of receipts and the breach of s365B of PAMDA.<sup>166</sup>

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<sup>161</sup> *The Chief Executive, DTFTWID v Dickie, D.W* [2007] QCCTPAMD 42 (24 August 2007) at 20.

<sup>162</sup> *The Chief Executive, DTFTWID v Dickie, D.W* [2007] QCCTPAMD 42 (24 August 2007) at 11.

<sup>163</sup> Duncan, above n 14, 12.

<sup>164</sup> Duncan, above n 14, 13.

<sup>165</sup> [2006] LPT 13.

<sup>166</sup> *Legal Services Commission v McClelland*, [2006] LPT 13 at [31].

## **PART 5 - REIQ**

### **10. *How is the Real Estate Industry coping with Chapter 11?***

The Office of Fair Trading ("OFT") "Real Estate Agency and Sales Practice Good Business Guide"<sup>167</sup> contains sections dealing with Contract Warning Statements<sup>168</sup> and the Cooling-Off Period.<sup>169</sup> These brief sections provide a basic outline of the content and effect of the Warning Statement together with an explanation of the Buyer's rights to withdraw from the contract during the Cooling-Off Period or to shorten or waive the Cooling-Off Period.

The Guide does not deal with Chapter 11 compliance and makes limited reference to the relevant provisions of PAMDA. A more detailed explanation of the process of contracting for residential property would more adequately emphasise the consumer protection objects of PAMDA and assist real estate agents and consumers in understanding PAMDA.

The real estate industry appears to have slowly adjusted to the changes and confusion wrought by the 2005 amendments though it appears there are still many real estate agents who are preparing and submitting contracts that are not PAMDA compliant.<sup>170</sup>

### **11. *What Training and Support does the REIQ provide to Agents?***

All new agents and salespersons who wish to obtain an REIQ Licence to sell real estate are required to complete a registration course recognised by the OFT. The REIQ offers a 5 day course for sales personnel. One of the components of that course is a seminar on preparation and execution of documentation and submitting offers to meet legislative requirements.<sup>171</sup>

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<sup>167</sup> <http://www.fairtrading.qld.gov.au/OFT/oftweb.nsf/web+pages/609246C5B219A3734A256B440031204F?OpenDocument&L1=Publications>

<sup>168</sup> "Real Estate Agency and Sales Practice Good Business Guide", Queensland Government Department of Tourism, Fair Trading and Wine Industry Development, pp 35-36.

<sup>169</sup> Ibid at pp 36-40.

<sup>170</sup> Information obtained from Johnson Property Lawyers, Broadbeach Waters.

<sup>171</sup> Professional Development provided by the Real Estate Institute of Queensland Course Information brochure current as at 5 December 2006.

The documentation preparation component of the course contains the following elements<sup>172</sup> –

- i. Document preparation for the sale of land
- ii. Recognising different implied terms
- iii. Presentation of contract documents
- iv. Overseeing execution of contracts
- v. Drafting special conditions
- vi. Responsibilities of holding a deposit.

In addition to the registration course, licenced real estate agents are required to undertake Continuing Professional Development (“CPD”) courses.

From discussions with the REIQ Compliance Department,<sup>173</sup> the compliance problems being encountered by the REIQ are primarily in respect of agents who have been licensed for some time, rather than those who have recently obtained their licence.

An example of how non-compliance arises is where the newly qualified salesperson, fresh from the REIQ training course, commences employment. That person attempts to prepare a proposed relevant contract in the manner instructed by the REIQ. The more experienced agent or principal of the agency then directs the new salesperson to prepare and submit the proposed relevant contract in a different manner, one that is not PAMDA compliant, because “...that’s the way we’ve been doing it for years”.

The end result is twofold –

- a. the new salesperson becomes confused and submits proposed relevant contracts incorrectly, thereby exposing the agency to statutory penalties for non-compliance with PAMDA; and

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<sup>172</sup> Professional Development provided by the Real Estate Institute of Queensland Course Information brochure current as at 5 December 2006.

<sup>173</sup> Interview with Anna McMaster, Compliance Department, REIQ (Telephone interview 7 September 2007).



- b. the principal of the agency contacts the REIQ demanding to know why the new salesperson has been taught the “wrong way” to prepare contracts.

It is suggested that it is the principal who is usually the party not complying with PAMDA. The newly qualified salesperson, fresh from training, is actually correct in their preparation however the principal has not kept themselves up to date, either with their CPD requirements or with legislative changes.

The end result is that the agency is exposed to penalties for non-compliance and jeopardises the sales of clients' properties. It is suggested that the REIQ should require every agent to attend a specific PAMDA compliance training course at least every 6-12 months. By requiring this higher level of on-going training, the REIQ would be better able to ensure that the industry members are aware of the full effect of PAMDA amendments.

Ultimately, the more mandatory training required, the better the protection of consumers in the residential property market. The flow-on effects of non-compliance for the agent and the seller of residential property are too serious to be ignored. An agent has a duty to act *uberrimae fidei*.<sup>174</sup> This duty extends particularly to the preparation of contract documentation.

An agent is expected to undertake their duties with the reasonable care and skill expected of a competent agent.<sup>175</sup> If the agent fails to maintain an appropriate level of professional development (insofar as relates to PAMDA compliance) or prepares a contract that is not compliant then, it is suggested, the agent has not undertaken their duties with the appropriate level of care and skill required. The non-compliance would result in the agent's actions being seen to be a breach of their duty to the client.

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<sup>174</sup> Butterworths, *Concise Australian Legal Dictionary* (1996) 399, “in utmost good faith”

<sup>175</sup> WD Duncan, *Real Estate Agency Law in Queensland* (4<sup>th</sup> ed, 2006) 153

## **12. What Can Be Done To Ensure Statutory Compliance?**

Training is the key to success with PAMDA. It is suggested that more training is required to ensure that the people who are responsible for preparation and submission of proposed and relevant contracts are submitting documents that are PAMDA compliant. The REIQ provides a telephone support system for members of the REIQ and for the general public.

The South East Queensland compliance officer, Ray Milton, receives approximately 60 telephone enquiries (and sometimes complaints) daily.<sup>176</sup> In discussions, Mr Milton has indicated that the majority of these enquiries focus on matters other than Chapter 11 compliance.

Mr Milton stated that he was unaware that there is still a significant proportion<sup>177</sup> of the real estate industry not complying with PAMDA. When this matter was brought to Mr Milton's attention he immediately suggested that the REIQ would, and indeed should, step up its training for agents and salespersons.

It has been observed that rarely is the selling agent the actual person who prepares a contract for signature. The task of contract preparation usually falls to an administrative assistant.<sup>178</sup> This is equally true of contract preparation in the legal field. Agents and administrative staff alike require appropriate initial and ongoing training.

The REIQ is pro-active in its training and support of agents and salespersons. However, as stated above, usually an administrator prepares the contract documents. It is the administrators who require specific training in this area. It is suggested that the training and support of administrative staff should be one of the critical issues to be addressed by the REIQ.

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<sup>176</sup> Interview with Ray Milton, Compliance Department, REIQ (Telephone interview 10 September 2007).

<sup>177</sup> From observations of contracts received by Johnson Property Lawyers approximately 20% are prepared or submitted incorrectly.

<sup>178</sup> Above n 70.

The REIQ does not offer any courses for administrative staff.<sup>179</sup> It is incumbent on the agent or salesperson, when completing their CPD requirements, to take what they have learned from those CPD courses and apply it in their agency. It is suggested that the passing down of information to administrative staff and other agents is not being carried out effectively in many agencies. As a result, the practical application and intricacies of complying with PAMDA has been largely missed. While agents are aware of the requirement and importance of a Warning Statement, it is suggested that the finer details of compliance, including directing the buyer's attention to that Warning Statement both before and after contract execution, have been largely overlooked.

A pro-active approach has been adopted by some members of the legal profession in order to assist the real estate agents to be PAMDA compliant. Shortly after the 2005 amendments became effective, some law firms provided training sessions for real estate agents to ensure that the agents were properly informed about contract preparation and submission.

As part of the information offered by that firm, examples of correctly collated contracts were prepared and delivered to various agencies on the Gold Coast for use as an informal in-house checklist. That firm also offered telephone assistance to any agents who were experiencing difficulty with contract preparation and submission. This support also extended to include incidental matters such as the proper drafting of special conditions. It was observed that as a result of this initiative, agencies that were struggling with the technical nature of the legislation were better equipped to be PAMDA compliant.

It is suggested that many other firms could, in conjunction with the REIQ, also conduct these brief training sessions for real estate agents. This involvement would create stronger and more dynamic relationships between lawyers and agents. Further, it would assist the REIQ in delivering the necessary information and training to the real estate industry without the necessity of overburdening the REIQ's training resources.

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<sup>179</sup> Above n 176.

## PART 6 - THE FUTURE

### 13. *What Is The Way Forward For PAMDA?*

It is suggested that PAMDA is destined to be one piece of legislation that constantly struggles to meet its Objects. PAMDA has been amended over 25 times and has been re-printed 23 times since it came into force in 2001. The legislation has an objective of consumer protection but it has struggled to deliver of that objective.

Since the 2005 amendments became effective, the Queensland real estate industry has been the recipient of some unsettling case law.<sup>180</sup> Fortunately, the uncertainty of *Blackman v Milne*<sup>181</sup> was remedied by the more recent decision in *Juniper v Roberts*.<sup>182</sup>

However, it is suggested that PAMDA must once again come under scrutiny. The legislation, as it stands, is convoluted. The technical requirements of Chapter 11 are inordinately difficult to follow and, without legal knowledge or extensive specialised training, PAMDA remains a trap for the unwary.

The purpose of PAMDA is consumer protection. However, contrary to the Objects of the Act, it is suggested that the legislators have lost sight of the fact that sellers are consumers. Clearly, it is not only buyers who should be protected by PAMDA. PAMDA should extend equally to protecting sellers of residential property. It is suggested that it is not only buyers who may suffer financially, sellers stand to lose large sums as well if, through no fault of their own, a contract is prepared and submitted in a way that is not strictly in accordance with the overly technical requirements of Chapter 11.

It is suggested that Chapter 11 should be reviewed. As it appears today, Chapter 11 is confusing and convoluted. Any further amendments to Chapter 11 should, it is suggested, focus on the primary object of consumer protection.

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<sup>180</sup> *Blackman v Milne* [2006] QSC 350.

<sup>181</sup> [2006] QSC 350.

<sup>182</sup> [2007] QSC 379 (6 December 2007).

The fundamental message that buyers should receive when entering into a contract for residential property is that they are entitled to the benefit of a cooling-off period which enables them to seek independent legal advice and an independent valuation of the property being purchased.

Should it be necessary for the person preparing the proposed contract to tiptoe through a minefield of statutory technicalities? It is suggested that the answer is “No”. When amending PAMDA in 2005 the legislators let a golden opportunity to properly provide for broad ranging consumer protection slip away.

The 2005 amendments resulted in a Chapter of PAMDA that is heavily prescriptive and technical and which places sellers of residential property at a significant disadvantage. Chapter 11 provides many opportunities for buyers to rely on insignificant technicalities to escape from what would, in any other circumstances, be interpreted as their contractual obligations.

## Appendix "A" – PAMDA Form 22a



### PAMD Form 22a

*Property Agents and Motor Dealers Act 2000*  
This form is effective from 4 February 2008

## APPOINTMENT OF REAL ESTATE AGENT (SALES AND PURCHASES)

### WARNING

THE CLIENT IS ADVISED TO SEEK INDEPENDENT LEGAL ADVICE **BEFORE** SIGNING THIS FORM.

This form must be completed and given to the client before the agent performs any service for the client. Failure to do so may result in a penalty and loss of commission.

This form enables a person (the "client") to appoint a real estate agent (the "agent") for the sale or purchase of property, land and businesses.

#### Instructions

Please complete in BLOCK letters. Attach extra pages if needed. All references to dates should be in DD/MM/YYYY. If you need help completing this form, please contact the Office of Fair Trading on 13 13 04.

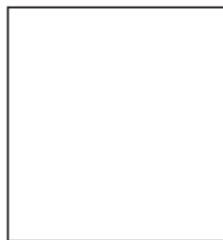
#### Part 1 - Client details

To be completed by the client  
(the person/company who  
the service will be performed  
for).

Name/s .....  
Company name (if applicable) .....  
BN / ACN: .....  
Registered for GST: ☐ Yes ☐ No ABN: .....  
Address .....  
Suburb ..... State    Postcode      
Phone ..... Fax / Email .....

#### Part 2 - Agent details

Agent's logo (optional).



Agency name .....  
Registered for GST: ☐ Yes ☐ No ABN: .....  
Licensee name .....  
Address .....  
Suburb ..... State    Postcode      
Phone ..... Fax / Email .....  
Licence number ..... Exp: .....

#### Part 3 - Property details

Please provide details of the  
property.

Address .....  
Suburb ..... State    Postcode      
Lot ..... Plan ..... Title reference .....

<b>Part 4 - Appointment of agent</b>	
<b>4.1 Appointment of agent</b> <small>If insufficient space, please attach.</small>	<p>The client appoints the agent to perform the following service/s:</p> <p><b>Sale of:</b> ..... <b>Purchase of:</b> .....</p> <p><small>(e.g. place of residence, land)</small></p> <p><b>Sale by auction</b></p> <p>The client does <input type="checkbox"/> / does not <input type="checkbox"/> authorise the agent to sell by auction.</p> <p><b>4.1.1 Performance of service</b></p> <p><b>To the agent:</b> State how you will perform the service AND any conditions, limitations or restrictions on the performance of the service (e.g. holding of open house, performing service as multi-list or conjunction sale, when and how auction to be conducted).</p> <p>.....</p> <p>.....</p> <p>.....</p>
<b>4.2 Reserve or listing price:</b>	<p>.....</p>
<b>4.3 Single or continuing appointment</b>	<p>The appointment is a: <input type="checkbox"/> Single appointment <input type="checkbox"/> Continuing appointment</p> <p><small>(for a particular service). (for a number of services over a period).</small></p> <p>End of continuing appointment: .....</p> <p><b>To the client:</b> If the appointment is a continuing appointment, you may revoke it by giving 90 days notice in writing to the agent, unless you and the agent agree to a shorter notice period (but it must not be less than 30 days).</p>
<b>Part 5 - Open listing, sole agency or exclusive agency</b>	
<b>5.1 End of sole/exclusive agency, option to continue as an open listing</b>	<p>You may appoint an agent to sell a property on the basis of an open listing or a sole agency or an exclusive agency.</p> <p><b>Open listing:</b> You appoint the agent to sell the property, but you retain a right to appoint other agents on similar terms, without penalty. The agent's appointment can be ended by either you or the agent at any time.</p> <p><b>Sole agency and exclusive agency:</b> You appoint the agent for a specified term. For sales of one or two residential properties, the term is negotiable up to a maximum term of 60 days. The agent can be reappointed for one or more further terms using <i>PAMD Form 23 - Reappointment of real estate agent, pastoral house or auctioneer</i>. In the case of three or more residential properties, the 60 day limit does not apply.</p> <p>If you are dissatisfied with your agent's service and want to appoint a new agent during the existing agent's term, and your property is sold during that term, you may have to pay:</p> <p>a) two commissions: a commission to each agent; and</p> <p>b) damages for breach of contract arising under the existing agent's appointment.</p> <p><b>If you need more information before you make a choice between open listing, a sole agency or an exclusive agency, ask your legal adviser.</b></p> <p><b>The appointment will be for a (please tick one of the following):</b></p> <p><input type="checkbox"/> Open listing <input type="checkbox"/> Sole agency <input type="checkbox"/> Exclusive agency</p> <p>Start date ..... End date .....</p> <p>For the sale of residential property, the term of a sole or exclusive agency is negotiable between the client and the agent up to a maximum term of 60 days.</p> <p><b>To the client:</b> At the end of the sole/exclusive agency, the client may elect to continue the appointment of the agent as an open listing, which may be ended at any time by the client or the agent.</p> <p><input type="checkbox"/> The appointment will continue as an open listing until ..... (Insert date).</p> <p><input type="checkbox"/> The appointment will NOT continue as an open listing.</p>

<b>Part 6 - Assignment clause</b>									
<p>Tick whether you agree or disagree with the assignment.</p> <p>In the absence of a tick and initials, it is taken that the client does not agree to this assignment clause.</p>	<p>The client agrees that the agent may, at any stage throughout the appointment, assign the appointment to another real estate agent without changing the terms of the appointment.</p> <p><input type="checkbox"/> I agree with the assignment clause.      <input type="checkbox"/> I disagree with the assignment clause.</p> <p>Client to initial: .....</p> <p><b>Note:</b> The client will receive notice of the assignment, including the name and business address of the agent being assigned the appointment.</p>								
<b>Part 7 - Commission</b>									
<p><b>7.1 Agreed commission</b></p> <p>Please note that you (the client) will:</p> <ul style="list-style-type: none"> <li>• have to pay Goods and Services Tax (GST) on any commission chargeable under this appointment; and</li> <li>• have the right to negotiate the commission, charges and services.</li> </ul>	<p>To the client: The <i>Property Agents and Motor Dealers Regulation 2001</i> sets a maximum amount of commission chargeable by your agent for residential property.</p> <p><b>You have a right to negotiate an amount lower than this amount of commission. In any other transaction, other than residential, the fees and services are not regulated.</b></p> <p><b>Agreed commission:</b> The client and the agent agree that the maximum commission (and GST) payable for the service to be performed by the agent is:</p> <p style="text-align: center;"><b>YOU MUST EXPRESS THE COMMISSION IN BOTH FORMATS</b></p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 60%; text-align: center; border-bottom: 1px solid black;">DOLLAR AMOUNT</th> <th style="width: 40%; text-align: center; border-bottom: 1px solid black;">PERCENTAGE</th> </tr> </thead> <tbody> <tr> <td style="border-right: 1px solid black;">TOTAL COMMISSION \$ .....</td> <td style="text-align: right;">..... %</td> </tr> <tr> <td style="border-right: 1px solid black;">GST \$ .....</td> <td style="text-align: right;">..... %</td> </tr> <tr> <td style="border-right: 1px solid black;">TOTAL PAYMENT \$ .....</td> <td style="text-align: right;">.....</td> </tr> </tbody> </table> <p><b>To the client</b></p> <p><b>Percentage:</b> Commission expressed as a percentage is worked out only on the actual sale price.</p> <p><b>Amount:</b> Commission expressed as an amount represents the commission payable if the property is sold at the reserve or listing price (see Part 4.2 above). The amount of commission payable may vary from the amount stated.</p>	DOLLAR AMOUNT	PERCENTAGE	TOTAL COMMISSION \$ .....	..... %	GST \$ .....	..... %	TOTAL PAYMENT \$ .....	.....
DOLLAR AMOUNT	PERCENTAGE								
TOTAL COMMISSION \$ .....	..... %								
GST \$ .....	..... %								
TOTAL PAYMENT \$ .....	.....								
<b>Part 8 - Fees and charges</b>									
<p><b>8.1 Amounts payable</b></p> <p>Please note that fees and charges chargeable under this appointment are inclusive of Goods and Service Tax (GST).</p>	<p>Amounts payable (list fee/charge and amount):</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>								
<p><b>8.2 When payable</b></p> <p>Agent to specify when commission, fees and charges are payable.</p>	<p>.....</p> <p>.....</p>								



<b>Part 9 - Expenses</b>									
<b>9.1 Authorisation to incur expenses</b> Agent is to complete in relation to each service or category of service. Attach schedule if extra space is required.	The client authorises the agent to incur the following expenses in relation to the performance of the service/s: (Agent to complete in relation to each service or category of service.) <b>9.1.1 Advertising/marketing</b> (if any): ..... ..... Authorised amount (\$): ..... <b>9.1.2 Other</b> (e.g. photocopying, telephone calls, facsimile transmissions, postage, etc): <b>Description of expense</b> ..... .....								
<b>9.2 Agent's rebate, discount, commission or benefit</b>	To the agent: State the source and the estimated amount or value or any rebate, discount, commission or benefit that you may receive in relation to any expenses that you may incur in connection with the performance of the service: <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 50%; text-align: center;">Source</th> <th style="width: 50%; text-align: center;">Estimated amount (\$) / Value (%)</th> </tr> </thead> <tbody> <tr> <td>.....</td> <td>.....</td> </tr> <tr> <td>.....</td> <td>.....</td> </tr> <tr> <td>.....</td> <td>.....</td> </tr> </tbody> </table>	Source	Estimated amount (\$) / Value (%)	.....	.....	.....	.....	.....	.....
Source	Estimated amount (\$) / Value (%)								
.....	.....								
.....	.....								
.....	.....								
<b>Part 10 - Signatures</b>									
<b>Client 1</b> Please note: If more than 2 clients, please photo copy this page when blank and attach when complete. All parties are to sign and keep a copy of this appointment.	To the client: If you want more information before you sign this form, visit the Office of Fair Trading's website at <a href="http://www.fairtrading.qld.gov.au">www.fairtrading.qld.gov.au</a> or call 13 13 04. All parties are to sign and keep a copy of this appointment. Signature ..... Signatory (print name) ..... Date signed <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>								
<b>Client 2</b>	Signature ..... Signatory (print name) ..... Date signed <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>								
<b>Agent</b>	Signature ..... Signatory (print name) ..... Date signed <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>								
When performing this service, the agent must comply with the code of conduct for agents as set out in the <i>Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation 2001</i> .									
<b>SCHEDULES OR ATTACHMENTS (IF APPLICABLE)</b>									

## **Appendix “B” – PAMDA Forms 27a and 27c**

This form must be completed and handed to the buyer before the contract for sale of residential property is entered into. Failure to make the required disclosure to the buyer will attract a penalty.

### **PAMD Form 27a**

This form is effective from 29 October 2001

#### **SELLING AGENT'S DISCLOSURE TO BUYER – what we must tell you before you sign.**

**1 TYPE OF SELLING AGENT (Selling agent to tick the relevant box)**

The disclosures must be made by any of the following people (selling agents) involved in the selling or marketing of residential property to a buyer:

- |   |   |
|---|---|
| <input type="checkbox"/> Real estate agent  | <input type="checkbox"/> Property developer   |
| <input type="checkbox"/> Real estate salesperson acting for the real estate agent | <input type="checkbox"/> Person acting as a real estate agent even though not authorised by a licence to do so  |
|   | <input type="checkbox"/> Person acting as a property developer even though not authorised by a licence to do so |

**2 SELLING AGENT'S DETAILS**

Name ..... ABN .....  
Business address .....  
Telephone number ..... Facsimile number .....  
Mobile telephone number ..... E-mail .....  
Licence no (if licensed) ..... Licence expiry date (if licensed) .....  
Registered number (if registered) ..... Registration expiry date (if registered) .....

**3 PROPERTY DETAILS**

Address .....  
Lot ..... Plan ..... Title reference .....

**4 BUYER'S DETAILS**

Name .....  
Address .....  
Telephone number ..... Facsimile number .....  
Mobile telephone number ..... E-mail .....

**5 SELLING AGENT'S DISCLOSURE OF RELATIONSHIPS**

*If you have referred the buyer as indicated please complete box (or attach additional sheet if required):*

I have referred the buyer for professional services associated with the sale. I have one or more of the following relationships with the person to whom I have referred the buyer:

- Family • Business (other than a casual business relationship) • Fiduciary
- A relationship in which one person is accustomed, or obliged, to act in accordance with the directions, instructions, or wishes of another.

Name of person to whom buyer referred (include company name)	Service	Nature of relationship



Queensland Government  
Department of Tourism, Racing and Fair Trading

#### 6 SELLING AGENT'S DISCLOSURE OF BENEFITS

I, the Selling Agent, and/or the following people have received, currently receive or expect to receive a monetary or other benefit (see note on what constitutes a 'benefit' below) in connection with the sale, or for promoting the sale or providing a service in relation to the sale of the property (please name the person, including corporations, to whom the benefit relates, and the amount, value or nature of the benefit):

Person/Company	Benefit
.....	.....
.....	.....
.....	.....

*If insufficient space, please attach a separate sheet detailing the benefits.*

**What benefits to declare:** you should declare all benefits, monetary or otherwise that any person has received, receives or expects to receive in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale of the property. This will include your fees or commission, amounts to be paid to the seller, the developer, financial institutions (including amounts to be paid to mortgagees), finance brokers, financial advisers, financiers, property valuers, marketing agents, solicitors and promotion fees. This list is not exhaustive.  
**You do not have to declare:** solicitors' professional fees and ordinary disbursements made by solicitors in relation to the sale or purchase of the property. You do not have to disclose amounts payable to local government or to the State or Federal Government.  
**Note:** If you do not know the exact amount of the benefit or if the benefit cannot be expressed in money terms, please estimate the value of the benefit in money terms or in relevant percentage terms (and note that it is an estimate) or describe the nature of the benefit.

#### 7 SELLING AGENT'S DISCLOSURE DECLARATION

I have read and completed Sections 5 and 6 (if required by the Act).

Name .....  
 Signature .....  
 Date .....

#### 8 ADDITIONAL DISCLOSURE DECLARATION BY PROPERTY DEVELOPER OR PERSON ACTING AS A PROPERTY DEVELOPER *Please indicate which applies.*

- ☐ I do hold an interest of at least 15% in the property.  
☐ I do not hold an interest of at least 15% in the property.

Name .....  
 Signature .....  
 Date .....

#### 9 BUYER'S ACKNOWLEDGEMENT

I/we have not yet entered into a contract for the purchase of the property described in section 3 above.

This form has been explained to me/us by the selling agent and I/we understand the nature and effect of the disclosures made in this form.

Name .....	Name .....
Signature .....	Signature .....
Date .....	Date .....

If you need more information about this form, you can visit the Office of Fair Trading website at [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au)

## SELLING AGENT'S DISCLOSURE TO BUYER — WHAT WE MUST TELL YOU BEFORE YOU SIGN

This form must be completed and handed to the buyer before the contract for sale of residential property is entered into. Failure to make the required disclosure to the buyer will attract a penalty.

**To the buyer:** The purpose of this form is to make you aware of relationships that your selling agent has with persons to whom they refer you, and of benefits that your selling agent and other people receive from the sale.

A selling agent must complete this form if they are one or more of the following:

- Real estate agent
- Real estate salesperson acting for a real estate agent
- Property developer
- Property developer salesperson
- Person acting as a real estate agent although not authorised by a licence to do so
- Person acting as a property developer although not authorised by a licence to do so

No attachments or schedules may be added to this form.

If you need more information about this form, you can visit the Office of Fair Trading website at [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au).

### Part 1 - Selling agent details

Please tick appropriate box.

Name .....

☐ Licence No. / ☐ Registered No. ....

### Part 2 - Property details

Address .....

Suburb/Town ..... State    Postcode

Lot ..... Plan .....

Title Reference .....

### Part 3 - Selling agent's disclosure

#### 3.1 Benefits

Notice to selling agent:

You **MUST** complete this section if you have referred the buyer to anyone for professional services associated with the sale and

- a) you have any relationship (personal or commercial) with that person or entity to whom you have referred the buyer; and/or
- b) you derive or expect to derive any consideration (whether monetary or otherwise) from that person or entity to whom you have referred the buyer.

Only complete this section if the described applies. If this does not apply to you, go to section 3.2.

For guidance on completing table and meaning of benefit, see Notes on page 3 of this form.

1. Name of person/entity to whom buyer referred	2. Nature of relationship with selling agent	3. Benefit derived by selling agent (if any) \$ Amount (see notes page 3)	4. Benefit to person/entity to whom buyer referred (if any). \$ Amount (see notes page 3)

If you have disclosed a benefit in this section, you **DO NOT** need to disclose it again in section 3.2.

If insufficient space, an additional Form 27c must be completed for the additional information.

<b>Part 3 - Selling agent's disclosure - continued</b>		
<b>3.2 Benefits other than by referral</b> Notice to selling agent: You MUST disclose the amount, value or nature of any benefit, to your knowledge, (other than those already disclosed by you in section 3.1) which any person has received, receives, or expects to receive in connection with the sale; for promoting the sale; or for providing a service in connection with the sale, of the property.           This table must be completed.	For guidance on completing table and meaning of benefit, see Notes on page 3 of this form.	
	Payment type	Entity receiving payment      \$ Amount * See note, page 3.
	Commission	
	Lead generation fees	
	Marketing fees	
	Referral/Introduction fees	
	Trailing commissions	
	Any other fees	
	TOTAL \$	
	If insufficient space, an additional Form 27c must be completed for the additional information.	

<b>Part 4 - Additional disclosure declaration by property developer or person acting as a property developer</b>	
This section applies ONLY if the property is being sold by a property developer.	<input type="checkbox"/> I am a property developer or person acting as a property developer, and hold an interest of at least 15% in the property. [Tick box if Yes]

<b>Part 5 - Selling agent's disclosure declaration</b>	
	The information I have provided in this form is true to the best of my knowledge, information and belief.  Name .....  Signature .....  Date: <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>

<b>Part 6 - Buyer's acknowledgement</b>	
	I/we have not yet entered into a contract for the purchase of the property described in section 2 above. This form has been explained to me/us by the selling agent and I/we understand the nature and effect of the disclosures made in this form.  Name .....  Signature .....  Date: <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>



#### NOTES TO COMPLETING SECTIONS 3.1 AND 3.2

##### In Section 3.1:

1. "Relationship" includes, but is not limited to, the following types of relationship:
  - Family
  - Business (other than a casual business relationship)
  - Fiduciary
  - Relationship in which one person is accustomed, or obliged, to act in accordance with the directions, instructions, or wishes of the other.
2. In Column 3 of the table you must disclose the amount (\$) or value (%) of consideration which you derive or expect to derive from the person or entity to whom you have referred the buyer.
3. In Column 4 of the table you must disclose the amount, value or nature of any benefit, which the person or entity to whom you have referred the buyer has received, receives or expects to receive in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property.
4. For guidance on what to disclose as a "benefit" see note below for Section 3.2.

##### In Section 3.2:

##### What you should disclose as a "benefit"

It is your obligation to disclose any benefit, to your knowledge, which any person has received, receives, or expects to receive in connection with the sale, or for promoting the sale, or providing a service in connection with the sale, of the property. The following lists are not exhaustive.

##### You NEED to disclose:

- your fees, commissions and remuneration
- fees, commissions and remuneration to be paid to financial institutions, finance brokers, financial advisers, financiers, valuers, marketing agents and promoters
- all benefits dependent on a successful sale (e.g. a commission or fee paid to any person as a success fee)
- marketing, advertising and promotion costs, where their payment is contingent on the sale of the lot ("the lot" is the property described in Item 2 on page 1 of this form).

##### Examples:

- a) where a marketing company will receive money or another benefit because the lot has sold – DO disclose
- b) where a marketing company will receive money or another benefit for the sale of three lots, and the lot is one of those – DO disclose, even where the other two lots have not yet sold.

As a general rule, you need to disclose any benefits contingent on the sale of the property.

##### You NEED NOT disclose:

- mortgage pay-outs
- performance bonuses
- expenses incurred prior to the sale in preparation of the property for sale (such as painting or maintenance) and in developing the land (such as professional fees and disbursements paid to engineers, surveyors, architects and town planners)
- vendor's profit or net proceeds of sale
- property developer's profit or development fees
- non-monetary benefits, where the total value of those benefits in any 12 month period does not exceed \$100
- solicitors' professional fees and ordinary disbursements in relation to the developing, selling or purchasing of the property
- amounts payable to local, State or Federal Government.

##### \$ Amount (or value or nature) of the benefit

You must provide the amount, value or nature of the benefit as accurately as is possible at the time of the disclosure. You should express the benefit as follows:

1. Amount (\$) including GST. If you can not do this, then –
2. a value (%). If you can not do this, then –
3. describe the nature of the benefit. You should ONLY do this if the benefit can not be described as an amount or value.

*If you do not know the exact amount or value of the benefit, provide a reasonable estimate of the final amount or value, based on the purchase price at the time of disclosure.*

##### Selling agent's commission

**If you are a real estate agent** — you are only required to disclose the total commission paid to your agency. You are not required to disclose how the commission is distributed to persons involved in the sale.

**If you are a property developer** — you must disclose the total commission paid on sale to your employees and/or salespersons. You are not required to disclose how the commission is distributed to persons involved in the sale.

**THIS PAGE IS PART OF THE APPROVED FORM AND MUST NOT BE DETACHED.**

## **Appendix “C” – PAMDA Form 29**



Queensland Government  
Department of Tourism, Racing and Fair Trading  
Incorporating  
Liquor Licensing

Property Agents and Motor Dealers Act 2000  
Section 366(4)

**DRAFT**

**PAMD FORM 29**

### **WARNING STATEMENT**

**The Attached Contract for Sale of Residential Property  
HAS NO COOLING-OFF PERIOD**

**YOU (THE BUYER) ARE STRONGLY RECOMMENDED TO OBTAIN  
INDEPENDENT LEGAL ADVICE ABOUT THE ATTACHED CONTRACT  
BEFORE SIGNING THE CONTRACT.**

**NOTICE TO AGENT**  
This Warning Statement  
must be:  
Attached to the front of a  
contract for sale of  
residential property and:  
Signed by the buyer  
**BEFORE** the attached  
contract is signed.  
If this is not done, the  
buyer may terminate the  
contract.

The attached contract has no cooling-off period.

By signing the attached contract you are committing yourself to serious  
legal obligations.

**After you and the seller have signed the contract you will be legally  
bound to buy the property, subject to the terms in the contract.**

Property Developers are not required to participate in the Claim Fund administered by the  
Office of Fair Trading. Therefore, if you buy a property directly from a property developer,  
you will not be able to access the Claim Fund. However, you may make a claim for  
compensation directly against the Property Developer.

Read the important information on the other side of this page BEFORE  
you sign this contract.

I/We ..... and ..... the Buyer have read  
and understand the information contained in this Warning Statement. I/We understand that by  
signing the attached contract I/we may be entering a binding contract with no cooling-off period.

#### **PLEASE SIGN HERE**

<b>BUYER:</b>	<b>BUYER:</b>	<b>WITNESS:</b>
Name: .....	Name: .....	Name: .....
Signature: .....	Signature: .....	Signature: .....
Date: .....	Date: .....	Date: .....

<b>SELLER/SELLER'S AGENT:</b>	<b>SELLER/SELLER'S AGENT:</b>	<b>WITNESS:</b>
Name: .....	Name: .....	Name: .....
Signature: .....	Signature: .....	Signature: .....
Date: .....	Date: .....	Date: .....

**IMPORTANT INFORMATION YOU SHOULD READ BEFORE YOU SIGN  
THIS WARNING STATEMENT AND THE ATTACHED CONTRACT**

***What happens after I sign the attached contract?***

After you sign the contract, it will be sent to the seller. If the seller signs the contract, then the contract will be legally binding on you and the seller.

This means that you will be bound to buy the property, subject to the terms in the contract. Make sure that before you sign the contract you are happy with all of the terms in the contract. Before signing the contract it is strongly recommended that you seek independent legal advice and clarify any doubts, queries or concerns that you may have about buying the property.

***What is a cooling-off period?***

You can change your mind about buying a property during a cooling-off period. But remember, this contract does NOT have a cooling-off period.

***There is no cooling-off period***

Because there is NO COOLING-OFF PERIOD for this contract, you will be legally bound if you sign the contract and the seller later signs it.

***No claim for loss by buyer dealing with Property Developer***

***No claim for loss by buyer dealing with Property Developer***

There is a Claim Fund under the *Property Agents and Motor Dealers Act 2000*. In some circumstances, a buyer who suffers financial loss as a result of dealing with an agent can make a claim against the Claim Fund. Strict guidelines apply. Property Developers are not required to participate in, or contribute to the Claim Fund. Therefore, if you suffer financial loss because of buying a property directly from a Property Developer you CANNOT make a claim for compensation against the Claim Fund. However, if you have a legitimate claim for loss as a result of dealing with a Property Developer, you may make a claim for compensation directly against the Property Developer.

***How do I know if I am dealing with a Property Developer?***

By requesting to see the personal identification card issued under the *Property Agents and Motor Dealers Act 2000* of the person you are dealing with you will be able to identify whether or not they are a Property Developer or an employee of one. A Property Developer will have a licence headed with the words "Property Agents and Motor Dealers (Property Developers) Licence". A Property Developer's registered salesperson will have a registration card headed with the words "Property Agents and Motor Dealers (Property Developers) Registered Employee Registration".

***Please Note:***

If you need more information before you sign this warning statement and/or the attached contract, please contact your legal adviser or the Office of Fair Trading. The Office of Fair Trading can be contacted on (07) 3246 1500 or you can visit the Office's website at [www.oftrading.qld.gov.au](http://www.oftrading.qld.gov.au).



## **Appendix “D” – PAMDA Form 30**

### **IMPORTANT INFORMATION YOU SHOULD READ BEFORE YOU SIGN THIS WARNING STATEMENT AND THE ATTACHED CONTRACT**

#### ***What happens after I sign the attached contract?***

After you sign the contract, it will be sent to the seller. If the seller signs the contract, then the contract will be legally binding on you and the seller.

This means that you will be bound to buy the property, subject to the terms in the contract. Make sure that before you sign the contract you are happy with all of the terms in the contract. Before signing the contract it is strongly recommended that you seek independent legal advice and clarify any doubts, queries or concerns that you may have about buying the property.

#### ***What is a cooling-off period?***

You can change your mind about buying a property during a cooling-off period. But remember, this contract does NOT have a cooling-off period.

#### ***There is no cooling-off period***

Because there is NO COOLING-OFF PERIOD for this contract, you will be legally bound if you sign the contract and the seller later signs it.

#### ***No claim for loss by buyer dealing with Property Developer***

##### ***No claim for loss by buyer dealing with Property Developer***

There is a Claim Fund under the *Property Agents and Motor Dealers Act 2000*. In some circumstances, a buyer who suffers financial loss as a result of dealing with an agent can make a claim against the Claim Fund. Strict guidelines apply. Property Developers are not required to participate in, or contribute to the Claim Fund. Therefore, if you suffer financial loss because of buying a property directly from a Property Developer you CANNOT make a claim for compensation against the Claim Fund. However, if you have a legitimate claim for loss as a result of dealing with a Property Developer, you may make a claim for compensation directly against the Property Developer.

#### ***How do I know if I am dealing with a Property Developer?***

By requesting to see the personal identification card issued under the *Property Agents and Motor Dealers Act 2000* of the person you are dealing with you will be able to identify whether or not they are a Property Developer or an employee of one. A Property Developer will have a licence headed with the words “Property Agents and Motor Dealers (Property Developers) Licence”. A Property Developer’s registered salesperson will have a registration card headed with the words “Property Agents and Motor Dealers (Property Developers) Registered Employee Registration”.

#### **Please Note:**

If you need more information before you sign this warning statement and/or the attached contract, please contact your legal adviser or the Office of Fair Trading. The Office of Fair Trading can be contacted on (07) 3246 1500 or you can visit the Office’s website at [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au).

**IMPORTANT INFORMATION YOU SHOULD READ BEFORE YOU SIGN  
THIS WARNING STATEMENT AND THE ATTACHED CONTRACT**

***What happens after I sign the attached contract?***

After you sign the contract, it will be sent to the seller. If the seller signs the contract, then the contract will be legally binding on you and the seller.

This means that you will be bound to buy the property, subject to the terms in the contract. Make sure that before you sign the contract you are happy with all of the terms in the contract. Before signing the contract it is strongly recommended that you seek independent legal advice and clarify any doubts, queries or concerns that you may have about buying the property.

***What is a cooling-off period?***

You can change your mind about buying a property during a cooling-off period. But remember, this contract does NOT have a cooling-off period.

***There is no cooling-off period***

Because there is NO COOLING-OFF PERIOD for this contract, you will be legally bound if you sign the contract and the seller later signs it.

***No claim for loss by buyer dealing with Property Developer***

***No claim for loss by buyer dealing with Property Developer***

There is a Claim Fund under the *Property Agents and Motor Dealers Act 2000*. In some circumstances, a buyer who suffers financial loss as a result of dealing with an agent can make a claim against the Claim Fund. Strict guidelines apply. Property Developers are not required to participate in, or contribute to the Claim Fund. Therefore, if you suffer financial loss because of buying a property directly from a Property Developer you CANNOT make a claim for compensation against the Claim Fund. However, if you have a legitimate claim for loss as a result of dealing with a Property Developer, you may make a claim for compensation directly against the Property Developer.

***How do I know if I am dealing with a Property Developer?***

By requesting to see the personal identification card issued under the *Property Agents and Motor Dealers Act 2000* of the person you are dealing with you will be able to identify whether or not they are a Property Developer or an employee of one. A Property Developer will have a licence headed with the words "Property Agents and Motor Dealers (Property Developers) Licence". A Property Developer's registered salesperson will have a registration card headed with the words "Property Agents and Motor Dealers (Property Developers) Registered Employee Registration".

**Please Note:**

If you need more information before you sign this warning statement and/or the attached contract, please contact your legal adviser or the Office of Fair Trading. The Office of Fair Trading can be contacted on (07) 3246 1500 or you can visit the Office's website at [www.oftrading.qld.gov.au](http://www.oftrading.qld.gov.au).

## **Appendix “E” – PAMDA Forms 30a and 30c**

### NOTICE TO AGENT

This Warning Statement must be:

- Attached to the **FRONT** of a contract for sale of residential property and;
- Signed by the buyer **BEFORE** the attached contract is signed.

If this is not done, the buyer may terminate the contract.

### **PAMD Form 30a**

This form is effective from 29 October 2001

The Contract attached to this warning is subject to a 5 day cooling-off period.

## **WARNING**

Do **NOT** sign the attached contract without reading and understanding this warning or if you feel pressured to sign.

You should obtain:

- **Independent legal advice** and
- **An independent valuation** of the property

Before signing or during the 5 day cooling-off period the Office of Fair Trading strongly recommends you:

- Contact the Australian Property Institute on (07) 3832 3139 or the Valuers Registration Board on (07) 3221 3882 to find a suitable valuer
- Arrange for a search for the **property's sales history** from your local office of Department of Natural Resources and Mines or in Brisbane on (07) 3227 6626

Read the important information on the other side of this page **BEFORE** you sign this statement. ➡

I/we have read this warning statement and the important information over the page. ➡

#### BUYER(S):

Name(s): .....

Signature: ..... 

Date: .....

#### WITNESS:

Name: .....

Signature: ..... 

Date: .....



**Queensland Government**  
Department of Tourism, Racing and Fair Trading

**IMPORTANT INFORMATION YOU SHOULD READ BEFORE YOU SIGN THIS  
WARNING STATEMENT AND THE ATTACHED CONTRACT**

**Independent legal advice**

Do you fully understand the legal consequences of signing this contract? Are you sure the advice you've been given is totally independent? Before signing the contract, the Office of Fair Trading strongly recommends you seek independent legal advice and clarify any doubts, queries or concerns you have about buying the property. You should exercise extreme caution in accepting the advice of anyone referred to you by the seller or his/her agent.

If you engage any lawyer in relation to purchasing the property, the lawyer must give you a certificate about the lawyer's independence from the seller or anyone else included in the sale and about benefits the lawyer expects to receive from the sale.

**Valuation of property**

Are you sure the purchase price is fair? Before you sign the contract you should seek independent advice from a registered valuer. Ask the valuer if they have Professional Indemnity Insurance, if they have a relationship with any person involved with the property you're buying, and about the valuation cost. You can contact the Australian Property Institute on (07) 3832 3139 or the Valuers Registration Board on (07) 3221 3892 to find an independent valuer.

Further information on how to deal with valuers is available from the Office of Fair Trading website at [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au)

**What is a cooling-off period?**

You can change your mind about purchasing a property during a 5 day cooling-off period. It is strongly recommended you use this time to seek independent legal advice and an independent valuation of the property you intend to buy.

**When does the cooling-off period start?**

The cooling-off period begins on the day that you are bound by the attached contract. You will be bound by the contract when you give to the seller or seller's agent a copy of

- The contract that has been signed by you and the seller
- A copy of the Declaration (PAMD Form 31a) signed by the seller and by you setting out the date that the seller signed the contract.

**Note:** If the buyer is bound by the contract on a day other than a business day, the cooling-off period commences on the first business day after the day the buyer is bound by the contract.

**When does the cooling-off period end?**

The cooling-off period ends at 5.00pm on the fifth business day after the cooling-off period started.

**What is a business day?**

A business day is a day other than a Saturday, Sunday or a public holiday.

**Can I waive or shorten the cooling-off period?**

You may, but you can only do so by obtaining a lawyer's certificate from your solicitor. If you waive the cooling-off period you will be bound by the contract from that time, subject to the terms of the contract.

**How do I terminate the contract during the cooling-off period?**

You may terminate the attached contract at any time before the end of the 5 day cooling-off period by giving a signed and dated notice to the seller or the seller's agent indicating that you wish to terminate the contract.

**Will I lose my deposit if I terminate the contract during the cooling-off period?**

The seller must refund your deposit within 14 days of termination of the contract. However, the seller may deduct a termination penalty equal to 0.25% of the purchase price from the deposit.

**What happens after the cooling-off period ends?**

You are legally bound to buy the property, subject to the terms in the contract. Make sure you're happy with all of the terms in the contract before you sign it and before the cooling-off period ends.

**Claim fund**

A Claim Fund was established under the Property Agents and Motor Dealers Act 2000. In some cases, a buyer who suffers financial loss as a result of dealing with a real estate agent can make a claim against the Claim Fund. Strict guidelines apply. If you suffer financial loss because of buying a property directly from a Property Developer you CANNOT make a claim for compensation against the Claim Fund.

**How do I know if I'm dealing with a licensed real estate agent or property developer?**

The Office of Fair Trading can help you to identify if the person you are dealing with is a licensed real estate agent, property developer or a registered salesperson of one.

Do not hesitate to ask the person you are dealing with for proof of their licence or registration.

**Further information:**

Contact [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au) or your nearest Office of Fair Trading.



## PAMD Form 30c

*Property Agents and Motor Dealers Act 2000*  
This form is effective from 4 February 2008. The Contract attached to this warning is subject to a 5 day cooling-off period.

**Notice to agent:** This Warning Statement must be:

- Attached to the **FRONT** of a contract for sale of residential property (vacant land or land and already existing house) and;
- Signed by the buyer **BEFORE** the attached contract is signed.

If this is not done, the buyer may terminate the contract.

# WARNING

**Do NOT sign the attached contract without reading and understanding this warning. Do not sign if you feel pressured.**

You should obtain:

- **Independent legal advice** and
- **An independent valuation** of the property

Before signing or during the 5 day cooling-off period the Office of Fair Trading strongly recommends you:

- Contact the Queensland Law Society on (07) 3842 5842 or [www.qls.com.au](http://www.qls.com.au) for advice on finding a solicitor.
- Contact the Australian Property Institute on (07) 3832 3139 or [www.propertyinstitute.com.au](http://www.propertyinstitute.com.au) or the Valuers Registration Board on (07) 3221 3892 or [www.valuersboard.qld.gov.au](http://www.valuersboard.qld.gov.au) to find a suitable valuer.
- Arrange a search for the property's sales history from your local Department of Natural Resources and Mines on (07) 3227 6626, or for a map of latest sales [www.nrm.qld.gov.au](http://www.nrm.qld.gov.au).

**House and land package buyers:** Is the building contract fairly valued? Seek quotes from several different builders (see note on page 2).

**STOP!!** Before signing this form or the contract have you read and understood the information about your rights?



**Buyer(s):**

I/we have read this warning statement and the important information over the page.



Name(s) .....

Signature .....

Date   /   /



**Important information you should read before you sign this warning statement and the attached contract**

**Independent legal advice**

Do you fully understand the legal consequences of signing this contract? Are you sure the advice you've been given is totally independent? Before signing the contract, the Office of Fair Trading strongly recommends you seek independent legal advice and clarify any queries or concerns you have about buying the property. Exercise extreme caution in accepting the advice of anyone referred to you by the seller or his/her agent.

If you engage any lawyer in relation to purchasing the property, they must give you a certificate about their independence from the seller or anyone else included in the sale, and about benefits the lawyer expects to receive from the sale.

**Valuation of property**

Are you sure the purchase price is fair? Before the cooling-off period expires seek independent advice from a registered valuer. Ask the valuer if they have Professional Indemnity Insurance, have a relationship with any person involved with the property you're buying, and about the valuation cost.

Further information on how to deal with valuers is available on [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au) (search "valuations").

**Building contracts**

For building contracts associated with the purchase of residential property.

- Domestic building contracts have a cooling-off period (Section 72 of the Domestic Building Contracts Act 2000. Please refer to the Building Services Authority of Queensland for further information on building contracts). Ensure that if you exercise your cooling-off right under the residential property contract that you also give written notice to terminate the building contract.
- Ensure that the building contract price is not over valued or inflated. Get a valuation or compare homes of similar value advertised or displayed by other home builders.

**What is a cooling-off period?**

You can change your mind about purchasing a property during a 5 day cooling-off period. Use this time to seek independent legal advice and an independent valuation of the property.

**When does the cooling-off period start?**

It begins on the day you are bound by the attached contract.

Both the buyer and the seller are bound by the contract as soon as the buyer or their agent, lawyer or personal representative receives a copy of the signed contract.

In any dispute concerning the commencement of the cooling-off period, it will be up to the seller to prove the buyer received a copy of the contract.

**Note:** If the buyer is bound by the contract on a day other than a business day, the cooling-off period commences on the first business day after the day the buyer is bound by the contract.

**When does the cooling-off period end?**

It ends at 5:00 pm on the fifth business day after the cooling-off period started.

**What is a business day?**

It is a day other than a Saturday, Sunday or a public holiday.

**Can I waive or shorten the cooling-off period?**

You may, but only by obtaining a lawyer's certificate from your solicitor. If you waive the cooling-off period you will be bound by the contract from that time, subject to the terms of the contract.

**How do I terminate the contract during the cooling-off period?**

At any time before the end of the 5 day cooling-off period give a signed and dated notice to the seller or the seller's agent indicating that you wish to terminate the contract.

**Will I lose my deposit if I terminate the contract during the cooling-off period?**

The seller must refund your deposit within 14 days of termination of the contract but may deduct a termination penalty equal to 0.25% of the purchase price.

**What happens after the cooling-off period ends?**

You are legally bound to buy the property, subject to the terms in the contract. Make sure you're happy with all of the terms in the contract before you sign it and before the cooling-off period ends.

**Claim fund**

A Claim Fund exists which, in some cases, enables a buyer who suffers financial loss as a result of dealing with a real estate agent to make a claim. Strict guidelines apply. If you suffer financial loss because of buying an investment property or buying residential property directly from a Property Developer you CANNOT make a claim for compensation against the Fund. There are restrictions on claims made due to property marketeering.

**How do I know if I'm dealing with a licensed real estate agent or property developer?**


The Office of Fair Trading can help you to identify if the person you are dealing with is a licensed real estate agent, property developer or a registered salesperson of one.

Ask the person you are dealing with for proof of their licence or registration.

**Further information:**

Contact [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au) or your nearest Office of Fair Trading on 13 13 04.

## **Appendix "F" – PAMDA Forms 31 and 31a**

 <p><b>Queensland Government</b> Department of Tourism, Racing and Fair Trading <small>Incorporating Liquor Licensing</small></p>	<p>Property Agents and Motor Dealers Act 2000 Section 365</p>							
<b>PAMD FORM 31</b>								
<b>DECLARATION BY SELLER SALE OF RESIDENTIAL PROPERTY</b>								
<p>This Declaration must be signed by the Seller of residential property and given to the Buyer BEFORE a contract for sale of residential property, that has a cooling-off period, can be binding on the Buyer and Seller.</p>								
<p><b>NOTICE TO SELLER:</b> The following five steps must be completed before you (the Seller) and the Buyer will be bound by the contract and the cooling-off period starts:</p>								
<div style="border: 1px solid black; padding: 5px; font-size: 2em; opacity: 0.5; transform: rotate(-15deg); display: inline-block;">DRAFT</div>								
<ol style="list-style-type: none"><li>1. The Buyer signs the contract ("the Contract").</li><li>2. You (the Seller) also sign the Contract.</li><li>3. You (the Seller) sign the declaration below stating the date on which you signed the Contract ("the Declaration").</li><li>4. You (the Seller) give the Buyer:<ol style="list-style-type: none"><li>(i) A copy of the Contract; and</li><li>(i) A copy of the Declaration below. <small>(This lets the Buyer know the date on which you (the Seller) signed the contract.)</small></li></ol></li><li>5. The Buyer returns to you or your agent:<ol style="list-style-type: none"><li>(i) A copy of the Contract; and</li><li>(i) A copy of the Declaration below. <small>(This lets you (the Seller) know that the Buyer is aware of the date when you (the Seller) signed the contract.)</small></li></ol></li></ol>								
<p>To help you and the Buyer to work out the date on which you will both be legally bound by the contract and <b>THE COOLING-OFF PERIOD STARTS</b>, please sign this declaration:</p>								
<p>I/We .....and ..... the Seller declare that I/we signed the contract for the sale of residential property at: Address: ..... ..... on ..... (date).</p>								
<table border="0" style="width: 100%;"><tr><td>Name: .....</td><td>Name: .....</td></tr><tr><td>Signature: .....</td><td>Signature: .....</td></tr><tr><td>Date: .....</td><td>Date: .....</td></tr></table>			Name: .....	Name: .....	Signature: .....	Signature: .....	Date: .....	Date: .....
Name: .....	Name: .....							
Signature: .....	Signature: .....							
Date: .....	Date: .....							
<p>Witness:</p> <p>Name: ..... Signature: ..... Date: .....</p>								
<p>Page 1 of 2 DRAFT FORM L2 30.04.01</p>								

#### NOTICE TO BUYER

The following five steps must be completed before you (the Buyer) and the Seller will be bound by the contract and the cooling-off period starts:

1. You (the Buyer) sign the contract ("the Contract").
2. The Seller also signs the Contract.
3. The Seller signs the declaration overleaf stating the date on which they signed the Contract ("the Declaration").
4. You (the Buyer) receive:
  - (i) A copy of the Contract; and
  - (ii) A copy of the Declaration overleaf.  
*(This lets you (the Buyer) know the date on which the Seller signed the contract.)*
5. You (the Buyer) give to the Seller or Seller's Agent:
  - (i) A copy of the Contract; and
  - (ii) A copy of the Declaration overleaf.  
*(This lets the Seller know that you (the Buyer) are aware of the date on which the Seller signed the contract.)*

To help you and the Seller to work out the date on which you will both be legally bound by the contract and the **COOLING-OFF PERIOD STARTS**, please sign the following statement:

I/we ..... and ..... the **Buyer** state that

the **Buyer** state that I/we have received:

- (i) A copy of the Contract (signed by both me/us and the Seller); and
- (ii) A copy of the Declaration overleaf (signed by the Seller declaring the date on which the Seller signed the Contract).

on ..... (date) This is the day the  
cooling-off period starts

Name: ..... Name: .....

Signature: ..... Signature: .....

Date: ..... Date: .....

Witness:

Name: .....

Signature: .....

Date: .....

For more information about the cooling-off period and what it means to be bound by the contract please read the Warning Statement issued by the Office of Fair Trading, required by law to be attached to the front of the contract. If you require further assistance you can visit the Office of Fair Trading's website at [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au).



This Declaration must be signed by the Seller of residential property (for which a cooling-off period will apply) and given to the Buyer.

## PAMD Form 31a

This form is effective from 29 October 2001

### DECLARATION BY SELLER SALE OF RESIDENTIAL PROPERTY

The purpose of this declaration is to let the Buyer know when you signed the Contract.

#### NOTICE TO SELLER

The following 5 steps must be completed before you (the Seller) and the Buyer will be bound by the Contract:

1. The Buyer signs the Contract.
2. You (the Seller) also sign the Contract.
3. You **sign the Declaration** below stating the date on which you signed the Contract.
4. You or your agent give the Buyer a copy of the Contract (signed by both parties) and a copy of the Declaration (signed by you).
5. The Buyer returns to you or your agent a copy of the Contract and a copy of the Declaration (this lets you know that the Buyer is aware of the date you signed the Contract).

**The 5 day cooling-off period\* commences on the day step 5 is completed.**

(Note: if the Buyer is bound by the Contract on a day other than a business day, the cooling-off period commences on the first business day after the day the Buyer is bound by the Contract, and ending at 5pm on the 5th business day.)

#### SELLER'S DECLARATION

I/we ..... and .....

the Seller declare that I/we signed the contract for the sale of residential property at:

Address: .....

on ..... (date)

Name: .....

Signature: ..... 

Date: .....

Name: .....

Signature: ..... 

Date: .....



Queensland Government  
Department of Tourism, Racing and Fair Trading

#### NOTICE TO BUYER

The following 5 steps must be completed before you (the Buyer) and the Seller will be bound by the Contract.

1. You (the Buyer) sign the Contract
2. The Seller also signs the Contract
3. The Seller **signs the Declaration** on this form stating the date on which they signed the Contract
4. You receive a copy of the Contract and a copy of the Declaration (this lets you know the date the Seller signed the Contract)
5. You return to the Seller or the Seller's Agent a copy of the Contract and a copy of the Declaration (this lets the Seller know that you are aware of the date they signed the Contract)

**The 5 day cooling-off period\* commences on the day step 5 is completed.**

(Note: if the Buyer is bound by the Contract on a day other than a business day, the cooling-off period commences on the first business day after the day the Buyer is bound by the Contract, and ending at 5pm on the 5th business day.)

#### BUYER'S DECLARATION

I/we ..... and .....  
declare that I/we have received a copy of the Contract signed by both me/us and the Seller, and a copy of the Declaration on page 1 of this form signed by the Seller  
on ..... (date)

Name: .....

Signature: ..... 

Date: .....

Name: .....

Signature: ..... 

Date: .....

\* For more information about the cooling-off period and what it means to be bound by the contract please read the Warning Statement issued by the Office of Fair Trading. This Warning Statement is required by law to be attached to the front of the Contract. If you require further assistance you can visit the Office of Fair Trading website at [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au) or call your local Office of Fair Trading.

## Appendix “G” – PAMDA Form 32a



### **PAMD Form 32a**

*Property Agents and Motor Dealers Act 2000*  
This form is effective from 4 February 2008

THIS FORM MUST BE COMPLETED BY:

- Any lawyer approached by a Buyer for advice or assistance regarding the purchase of residential property (not by auction).
- A lawyer, before the 5 day cooling-off period can be waived or cancelled (applying to residential property sales not by auction).

## **LAWYER'S CERTIFICATIONS**

(INDEPENDENCE OF LAWYER, WAIVING AND SHORTENING COOLING-OFF PERIOD)

#### **Buyer please note**

The certifications in this form are designed to ensure that you are aware of certain information which may influence your decision to enter into a contract for the purchase of property or your decision to forgo or shorten the statutory cooling-off period. They are important certifications which your lawyer must attend to.

Please read the *PAMD Form 30c Warning Statement* (required by law to be attached to the front of a contract to buy residential property in Queensland) as it explains your right to a cooling-off period. You may waive or shorten the cooling-off period only by obtaining a certificate under sections 2 or 3 in this form.

#### **Lawyer please note**

The certifications in this form relate to the requirements of sections 365B, 369 and 370 of the *Property Agents and Motor Dealers Act 2000*.

Any lawyer engaged by a buyer or prospective buyer of residential property (other than by auction) in relation to the purchase of that property, must complete the certification in section 1 below and must explain to the Buyer the purpose and nature of the certificate.

The 5 day cooling-off period applicable to the purchase of all residential property in Queensland (other than by auction) can only be:

- a) waived, if a lawyer completes the certification in section 2; or
- b) shortened, if a lawyer completes the certification in section 3.

If you are approached solely in relation to the waiving or shortening of the cooling-off period and your declaration in section 1 indicates that you are not independent from the Seller, the Seller's agents and anyone else involved in the sale, promotion of the sale, or provision of a service in connection with the sale of the property, you will not be able to make the certifications in sections 2 or 3 below. The Buyer must approach an independent lawyer to obtain such a certification.

Please refer to the notes on page 4 before completing this form.

#### **Lawyer's details**

Name .....

Firm .....

Address .....

#### **Property details**

Address .....

Lot .....

Plan .....

Title reference .....

#### **Buyer's details**

Name .....

Address .....

#### **Seller's details**

Name .....

Address .....

#### **Seller's agent's details**

Name .....

Address .....

<b>Part 1 - Independence of lawyer</b>																			
<p><i>Lawyer to tick whichever is applicable.</i></p> <p><input type="checkbox"/> I have no business, family or other relationship with the Seller, the Seller's agent or another person associated with the sale, promotion of the sale or provision of a service in connection with the sale of the property.</p> <p><input type="checkbox"/> I act for the Seller, the Seller's agent or another person associated with the sale, promotion of the sale or provision of a service in connection with the sale of the property. If so, specify for whom you act and in what capacity:</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p><input type="checkbox"/> I have a business, family or other relationship with the Seller, the Seller's agent or another person associated with the sale, promotion of the sale or provision of a service in connection with the sale of the property. If so, specify the nature of the relationship and with whom you have that relationship:</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p style="text-align: center;"><i>If insufficient space, please attach a separate sheet detailing the relationships.</i></p> <p><i>Lawyer to tick whichever is applicable:</i></p> <p><input type="checkbox"/> I have not received/am not receiving and do not expect to receive:</p> <p><input type="checkbox"/> I have received/am receiving or expect to receive:</p> <p>a benefit [see note on what constitutes a 'benefit' over the page] in connection with the sale, or for promoting the sale or for providing a service in connection with the sale of the property other than the professional costs and disbursements payable by the Buyer from the following people. If you have indicated a positive response to the above, please name the person, including a corporation, to whom the benefit relates and the amount, value or nature of the benefit:</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; width: 50%; padding: 5px;">Person providing benefit</th> <th style="text-align: left; width: 50%; padding: 5px;">Benefit</th> </tr> </thead> <tbody> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> </tbody> </table> <p style="text-align: center;"><i>If insufficient space, please attach a separate sheet detailing the benefits.</i></p> <p>I have read and completed this certificate and have explained to the Buyer the purpose and nature of this certificate.</p> <p>Lawyer to sign .....</p> <p>Name .....</p> <p>Signature .....</p> <p>Date <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/></p>		Person providing benefit	Benefit	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Person providing benefit	Benefit																		
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**Part 2 - Waiving cooling-off period**

This certification must be given to the Seller or the Seller's Agent before the buyer is bound under the contract.

I have been instructed by my client ..... the Buyer under a contract for the purchase of residential property in Queensland, that the Buyer wishes to waive the cooling-off period. The Buyer under the contract is not yet bound by the contract.

I am independent of the Seller, the Seller's Agent and anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have no business, family or other relationship with the Seller or Seller's Agent.

I have not received, am not receiving and do not expect to receive any benefit in connection with the sale of the property from anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have explained to the Buyer the effect of the contract, the purpose and nature of this Lawyer's Certificate and the legal effect of the Buyer giving this Certificate to the Seller or Seller's Agent.

Lawyer to sign .....

Name .....

Signature .....

Date   /   /

**Part 3 - Shortening cooling-off period**

This certification must be given to the Seller or the Seller's agent before the cooling-off period ends. The effect of this Certificate is to shorten the cooling-off period to 5 pm or another stated time on the date stated on this Certificate.

I have been instructed by my client ..... the Buyer under a contract for the purchase of residential property in Queensland, that the Buyer wishes to waive the cooling-off period.

The cooling-off period commenced on   /   /     (date) and was to have ended at 5 pm on   /   /     (date).

The cooling-off period will now end at ..... pm on   /   /     (date).

I am independent of the Seller, Seller's Agent and anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have no business, family or other relationship with the Seller, Seller's Agent and anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have explained to the Buyer the effect of the Contract, the purpose and nature of this Lawyer's Certificate and the legal effect of the Buyer giving this Certificate to the Seller or Seller's Agent.

Lawyer to sign .....

Name .....

Signature .....

Date   /   /

If you need more information about this form, you can visit the Office of Fair Trading website at [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au) or contact your local Office of Fair Trading on 13 13 04.

## LAWYER'S NOTES

### (INDEPENDENCE OF LAWYER, WAIVING AND SHORTENING COOLING-OFF PERIOD)

#### Independence of lawyer

The intention of the Act is for lawyers to disclose relationships and benefits they receive from the sale which may affect their ability to be objective when rendering advice to a Buyer. Examples of relationships that should be disclosed include:

- trustee/beneficiary;
- fiduciary;
- solicitor and client (where currently active for both parties);
- donee of power of attorney;
- carer relationship;
- guardianship; and
- emotionally dependent relationships (e.g. de facto).

Relationships that do not need to be disclosed include:

- casual acquaintance; and
- membership of the same club or association

You should declare all direct or indirect **benefits** to you or your firm or to a person on your behalf or on behalf of your firm that will come from or will be charged against the proceeds of the sale, other than your professional costs and ordinary disbursements payable by the Buyer relating to the purchase of the property. If you do not know the exact amount of the benefit or if the benefit cannot be expressed in money terms, please estimate the value of the benefit in money terms or in relevant percentage terms (and note that it is an estimate), or describe the nature of the benefit.

#### Steps to take before Contract is binding

The following steps must be completed before the Seller and the Buyer will be bound by the Contract.

- The Buyer signs the Contract.
- The Seller also signs the Contract.
- The Buyer or the Buyer's agent receives a copy of the contract signed by the buyer and the seller.

#### The 5 day cooling-off period commences.

(Note: If the Buyer is bound by the Contract on a day other than a business day, the cooling-off period commences on the first business day after the day the Buyer is bound by the Contract, and ending at 5 pm on the 5<sup>th</sup> business day.)

## **Appendix “H” – Comparison of two price lists<sup>183</sup>**

### **TWO TIERS OF PRICING?**

#### **Comparison of two price lists for off the plan sales Gold Coast high rise apartment block, 1998**

<b>Unit number</b>	<b>Price List A</b>	<b>Price List B</b>	<b>Actual sale price</b>
1	\$311,000	\$285,000	
Manager	\$2,300,000	\$1,800,000	
3	\$356,000	\$335,000	
4	\$317,000	\$283,000	\$280,000
5	\$278,000	\$237,000	
6	\$341,000	\$315,000	\$280,000
8	\$327,000	\$286,000	\$280,000
9	\$283,000	\$239,000	\$239,000
10	\$351,000	\$318,000	\$280,000
12	\$336,000	\$289,000	\$285,000
13	\$288,000	\$242,000	\$242,000
14	\$356,000	\$321,000	\$320,000
17	\$293,000	\$245,000	\$245,000
21	\$298,000	\$248,000	\$240,000
33	\$383,000	\$355,000	\$370,000
39	\$393,000	\$361,000	\$400,000
42	\$398,000	\$364,000	\$379,000
43	\$421,000	\$425,000	\$415,000
48	\$422,000	\$370,000	\$416,000
50	\$401,000	SOLD	\$356,000
51	\$432,000	\$373,000	\$415,000
53	\$405,000	\$358,000	\$398,000
56	\$415,000	\$361,000	\$366,000
57	\$446,000	\$379,000	\$410,000
58	\$466,000	\$447,000	\$460,000
59	\$424,000	\$364,000	\$405,000
61	\$476,000	\$452,000	\$474,000
64	\$481,000	\$457,000	\$470,000
65	\$444,000	\$370,000	\$416,000
66	\$476,000	\$388,000	\$405,000
71	\$464,000	\$376,000	

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<sup>183</sup> Queensland Parliament, Mr Phil Dickie, “*Two tier real estate markets in Queensland – Report on an investigation conducted for the Queensland Office of Fair Trading*”, Parl Paper No 2070, (1999), 35.



## **Appendix “I” – Body Corporate and Community Management Form 14 Warning Statement**



Queensland Government

Department of Tourism, Fair Trading and  
Wine Industry Development

ABN: 29 557 409 556

### **BCCM Form 14**

Body Corporate and Community Management Act 1997

This form is effective from 1 May 2006

## **CONTRACT WARNING (BODY CORPORATE INFORMATION)**

**Notice to Agent:** The *Property Agents and Motor Dealers Act 2000* and *Body Corporate and Community Management Act 1997* (the Act) include strict requirements for presentation of prescribed warning statements and information sheets. Failure to comply may result in cancellation of the contract.

By law the seller must attach this information sheet to the top of the contract.  
Do NOT sign the contract of sale without reading this information sheet.

In addition to the contract, you should have before you:

- ☒ A separate warning statement, if the lot is a residential property, provided by the seller under the *Property Agents and Motor Dealers Act 2000*.
- ☒ A disclosure statement provided by the seller, containing essential information about the body corporate that you will become a member of through purchasing this property (eg. the amount of annual contributions currently set by the body corporate and payable by the lot owner).

### **Community titles schemes**

This contract warning contains important information you should read and understand before signing a contract to buy a lot in a community titles scheme. A community title scheme includes duplexes, residential unit blocks, high rise apartment complexes, town house complexes and some commercial premises. They contain individually owned units and common property such as lawns and access roadways.

Some new unit owners do not realise owning a lot in a community titles scheme brings with it certain obligations. You should carefully consider if living or investing in a community titles scheme suits your lifestyle and financial needs.

When a community titles scheme is established, a body corporate is created to administer the scheme. Each lot owner is automatically a member of their body corporate and enjoys certain rights and responsibilities. Owners are not able to decline to be a member of their body corporate. Normally, an elected committee carries out day to day functions on behalf of the body corporate. Bodies corporate may also engage service providers such as body corporate managers and on-site managers, caretakers and letting agents.

Common obligations of a body corporate include:

- administering the common property and any body corporate assets
- enforcing the by-laws for the scheme, such as noise levels, the keeping of pets, car parking and a range of other matters
- arranging compulsory body corporate insurance
- conducting general meetings of owners, adopting budgets, and levying contributions to fund the operation of the body corporate
- maintaining bank accounts, keeping records, and preparing financial statements



Common obligations of individual lot owners include:

- making financial contributions toward the body corporate administrative costs
- complying with by-laws
- maintaining their lot in good condition

#### **Suggested searches and matters to investigate**

There are significant differences between owning a lot in a community titles scheme and owning other types of property (such as a detached house). In addition to carrying out conveyancing searches, it is also recommended you investigate a number of special body corporate matters through the following sources:

##### **1. Department of Natural Resources, Mines and Water, Land Registry**

Obtain a copy of the **community management statement** for the scheme from the nearest Land Registry Service Centre of the Department of Natural Resources, Mines and Water. The community management statement provides important details about the particular community titles scheme including details of any proposed future development of the scheme, the lot entitlements, by-laws and the regulation module applying to the scheme. Further information is available from the Brisbane Land Registry Office Service Centre by phoning (07) 3227 6626 or via the Department website: [www.nrm.qld.gov.au](http://www.nrm.qld.gov.au)

##### **2. Department of Tourism, Fair Trading and Wine Industry Development, Office of the Commissioner for Body Corporate and Community Management**

Conduct a search at the Office of the Commissioner for Body Corporate and Community Management for any Adjudicator's Orders (a decision regarding the outcome of a dispute) made concerning the scheme.

General information is also provided about body corporate rules and regulations. For more information, phone **1800 060 119** or visit [www.bccm.qld.gov.au](http://www.bccm.qld.gov.au)

##### **3. Body Corporate Secretary**

Obtain a **Body Corporate Information Certificate** from the body corporate secretary, or body corporate manager, whose name and address is supplied in the *disclosure statement*. Compare the disclosure statement with the information certificate, as inaccurate information in the disclosure statement may give you grounds to cancel the contract (Sections 209 or 217 of the Act).

A search of the body corporate records can provide other important information, such as whether any improvements to the lot you are purchasing (balcony enclosure, air conditioning) were approved, whether any conditions apply, and who is responsible for their maintenance and insurance.

Also, check for any agreements the body corporate may have entered into, for example, caretaking, letting, body corporate management or lift maintenance.

#### **Checklist**

- ☒ By purchasing this property, do you know you will be part of a body corporate?
- ☒ Are you aware of any contracts the body corporate is a party to?
- ☒ Have you read and understood the body corporate by-laws?
- ☒ Do you understand your likely financial contributions to the body corporate?
- ☒ Do you understand your maintenance responsibilities?
- ☒ Do you understand the role of the body corporate manager and on-site manager (if appointed)?

**You are strongly advised to obtain independent legal advice regarding any questions or concerns you have about purchasing the property or your prospective rights and obligations as a member of a body corporate.**

## **Appendix “J” - PAMDA – Definitions for Chapter 11**

### **364 Definitions for ch 11**

In this chapter—

***attached***, in relation to a warning statement, any information sheet and a contract, means attached in a secure way so that the warning statement, any information sheet and the contract appear to be a single document.

*Examples of ways a warning statement and any information sheet may be attached to a contract—*

- binding
- stapling

***business day*** means a day other than a Saturday, Sunday or public holiday.

***cooling-off period***, for a relevant contract, means a period of 5 business days—

- (a) starting on the day the buyer under the relevant contract is bound by the relevant contract or, if the buyer is bound by the relevant contract on a day other than a business day, the first business day after the day the buyer is bound by the relevant contract; and
- (b) ending at 5p.m. on the fifth business day.

*Example—*

Assume a contract is entered into at any time on Monday and the buyer is bound by the contract. Assume also that the cooling-off period is not affected by public holidays. The cooling-off period ends at 5p.m. on Friday.

***disclosure statement*** see the *Body Corporate and Community Management Act 1997*, section 205A.

**electronic communication** see the *Electronic Transactions (Queensland) Act 2001*, schedule 2.

**formed on a sale by auction** means formed on sale by auction—

- (a) directly on the fall of the hammer, by outcry; or
- (b) directly at the end of another similar type of competition for purchase.

*Examples—*

- 1 A contract for the sale of property is formed on a sale by auction when the auctioneer declares the property sold on the fall of the hammer.
- 2 A contract for the sale of property is not formed on a sale by auction when the property is passed in at auction and a bidder subsequently negotiates and purchases the property.

**information sheet** see the *Body Corporate and Community Management Act 1997*, section 206(5) or (6) or 213(5) or (5A).

**relevant contract** means a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction.

**termination penalty**, in relation to a relevant contract, means an amount equal to 0.25% of the purchase price under the relevant contract.

**unit sale** means a sale of a lot included in a community titles scheme, or proposed to be included in a community titles scheme, within the meaning of the *Body Corporate and Community Management Act 1997*.

**warning statement** means a statement in the approved form that includes the information mentioned in section 366D(1).

## **Appendix “K”- Electronic Transactions (Queensland) Act 2001 s 11**

### **“11 Requirement to give information in writing**

- (1) If, under a State law, a person is required to give information in writing, the requirement is taken to have been met if the person gives the information by an electronic communication in the circumstances stated in subsection (2).
- (2) The circumstances are that—
  - (a) at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and
  - (b) the person to whom the information is required to be given consents to the information being given by an electronic communication.”

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## 2. Case Law

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*Grieve & Anor v Enge & Anor* [2006] QSC 37.

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*International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644.

*Johnston v Jewry & Anor* [2006] QSC 361.

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*Juniper v Roberts* [2007] QSC 379

*Kaech v Collins* [2006] QSC 128.

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*Legal Services Commission v McClelland* [2006] LPT 13.

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*MNM Developments Pty Ltd v Gerrard* [2005] QCA 230.

*Ogle v Comboyuro Investments Pty Ltd* [1976] HCA 21.

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